PROPERTY LAW: 2002-2003

VOLUME ONE

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CHAPTER ONE

PROPERTY IS RIGHTS NOT THINGS

INTRODUCTION

These materials are designed to achieve two principal purposes. First, most of the chapters deal with the basic principles of the common law of real property (land law). In this area they deal both with traditional common law "ownership" and rights less than ownership (including leasehold relationships), and with common law aboriginal title. Second, principally in the first two chapters, the materials examine the nature of property. They ask what the word "property" means to a lawyer, and examine how the courts deal with claims that things not previously considered to be "property" should be made so.

While in one sense these two purposes are distinct (land is obviously property in common law societies) in another sense they are intimately related. This is because while land is "property", we will see that the rights of owners are contested matters. Thus your study of the rules regulating the uses of real property should be carried out against the background of the more general and theoretical material dealt with in the first two chapters.

The first proposition we will examine is contained in the title to this chapter - "property is rights not things". For lawyers, the word "property" refers to that set of rules which govern "the relations among people regarding the control, use and transfer of valued resources": Singer, Property Law, p. xxxvii. It is useful to break down this definition into its constituent parts, and expand briefly on each:

(a) Property is a "set of rules". Lawyers are interested not in the "things", the resources which are the objects of property law, but in the rules which govern how those resources are to be used.

(b) Property rules govern "relations among people". Property rules allocate rights in things to and among people. These property entitlements are never absolute. The rules vary depending on the thing being regulated, the type of entitlement (see "c" below), and the relationship involved.

(c) Property rules govern "control, use and transfer". Property rules therefore deal with various kinds of entitlements. Principally they involve rights to use (and limits on those rights), rights to exclude others from using, and rights to transfer.

(d) Property rules concern "valued resources". But this is somewhat tautological, because for the most part a resource is not valued until property rules are applied to it. But that is the point - property law concerns itself with which things should be the subject of property.

One further general point, not expressly included in the definition above, should be added here. In addition to not being absolute, property rules are not static. They vary according to time, place, and context. They therefore represent one way of responding to social conflict.

THE CATEGORISATION OF PROPERTY IN THE COMMON LAW

The principal traditional distinction in the common law of property is that between REAL PROPERTY (land) and PERSONAL PROPERTY (all other forms of property). This is actually a distinction which derives from medieval forms of civil procedure - different actions were available to sue in relation to land than were available for all other actions.

Whatever its origins, this distinction still governs the way in which property is categorised in the common law. Real property is further sub-divided into corporeal hereditaments - essentially the estates system described in chapter three - and incorporeal hereditaments - interests less than title such as easements and covenants, described in chapters six and seven.

Personal property is usually sub-divided into the categories of choses in possession and choses in action, which translates as tangibles and intangibles. "Intangibles" means such "things" as copyright, trademarks, patents, stocks, bonds, corporate shares, a right to enforce a debt, a claim to pension payments in the future, even though some of them have tangible manifestations - a share certificate, for example. In Canada a bank note is a sui generis entity, not categorised as either a chose in possession or a chose in action.

Note the use of the word "traditional" in the first sentence of this note. The real-personal distinction does not include aboriginal rights to land, and it is unclear where these should go. They might be seen as a third principal category under real property - they are certainly not corporeal or incorporeal hereditaments. It is more likely that they should be seen as unique interests, adding a third general category to the real-personal distinction.

NOTES

1) In Committee for the Commonwealth of Canada v. Canada (1991), 77 D.L.R. (4th) 385 (S.C.C.) the Supreme Court of Canada dealt with the issue of whether the federal government could bar people from distributing political propaganda and soliciting membership at an airport. As this was an action against government regulation the case turned on the freedom of expression guarantee in the Charter of Rights. The Court held that the Charter protects the right to expressive activity in public airports. The judges did not agree, however, on much else, and six separate opinions were given. For current purposes the judgments of Lamer C.J.C., L'Heureux-Dube J. and McLachlin J. are important. L'Heureux-Dube J. held that there was a prima facie right to expression on all government property, and that any limitations must be justified under section 1 of the Charter, the limitation provision. Lamer C.J.C. and McLachlin J. both held that there was an "internal" limitation within the freedom of expression guarantee. Lamer C.J.C. found that while government property was not like private property, and was presumptively a place where an individual had a right to express opinions, he or she could do so only if the form of the expression was compatible with the function of the place and did not interfere with the ordinary workings of the airport and the interests of the airport authorities and passengers. McLachlin J. focused both on the nature of the expression and on the forum. Some government property was traditionally "private", some traditionally "public". Once it was established that the property in question was the latter, and that the expression promoted one of the purposes for having a guarantee of freedom of expression, there was prima facie a breach, and any limitation had to be justified under section 1.

2) Aalto owns a shopping mall in downtown Toronto. Located in the business district, the mall is designed with the well-off customer in mind. Most of the stores and restaurants in the mall are out of the price-range of the average consumer. Even Bertoia's, the only supermarket in the mall, is decorated to look like a charming old Italian street of small food shops and cafés, features mouth-watering displays of expensive foods, and flies in certain delicacies such as fresh sushi daily. In the winter, the mall is one of the few places in the neighbourhood where people can meet and wander around out of the cold. As a result, the mall attracts many people who cannot afford to shop at most of its stores. Last winter, during a period of abnormally cold weather, the mall began having problems with street kids who would hide in the mall or refuse to leave when it was closing so that they could sleep there overnight. Concerned that any leniency on its part might encourage this behaviour, risking property damage and the loss of the mall's cachet, the mall management implemented a new policy of arresting these street kids under the Ontario Trespass to Property Act whenever the management found them in the mall. The Act gives the manager of the mall or a security guard the right to ask any member of the public to leave the mall at any time and for any reason. If the person does not leave immediately, he or she commits an offence punishable by a fine of up to $1,000 and may be arrested by the manager or security guard and delivered into the custody of a police officer. Failure to pay can result in a jail term under the Provincial Offences Act.

This policy backfired on Aalto's managers. Anti-poverty groups and church organizations were outraged that the mall would charge under the Act street kids seeking shelter, particularly since most of these kids would be unable to pay the fine and would end up in jail. The anti-poverty critics argued that the Harris government's cutbacks had led to desperate measures for desperate times, and the church groups advocated charity. In an attempt to change the mall's policy and to force the government to take measures to guarantee adequate shelter, a coalition of these groups began distributing leaflets in the mall. Instead of backing down, the mall management, which had long had a no-solicitation policy, charged the activists distributing leaflets, in turn, under the Trespass to Property Act.

Are the street kids liable for trespass?

Are the people distributing leaflets liable for trespass?

CHAPTER TWO

WHICH RIGHTS IN WHICH THINGS?

INTRODUCTION

This chapter is about novel claims for property rights. That is, the cases involve courts deciding whether to award property rights in certain things to certain individuals. Some involve claims to a substantial bundle of rights, others to a more limited number of strands. In some the contest is essentially between private claimants, in others the thing in question will either be subjected to a private property regime or a common property one. These cases reveal that Macpherson is correct to suggest that "property" is a changing concept. In reading them, and the discussion of theories of property immediately below, it might also be useful to bear in mind, even if you do not agree with it, Macpherson's further assertion that the concept of property is a "purposeful" one, that its meaning alters over time because of changing conceptions about how social interests may best be served.

In a part of his "Introduction" not reproduced in chapter one, Macpherson expands on his statement that although property is an enforceable claim to the use or benefit of something, property rights do not rest on force or the threat of force alone. He points out that all societies provide ethical justifications for private property. He states: "Property is controversial ... because it subserves some more general purposes of a whole society, or the dominant classes of a society and these purposes change over time: as they change, controversy springs up about what the institution of property is doing and what it ought to be doing. [Thus] ... the institution ... of property is always thought to need justification by some more basic human or social purpose. The reason for this is implicit in two facts we have already seen about the nature of property: first, that property is a right in the sense of an enforceable claim; second, that while its enforceability is what makes it a legal right the enforceability itself depends on a society's belief that it is a moral right. Property is not thought to be a right because it is an enforceable claim: it is an enforceable claim because it is thought to be a human right. This is simply another way of saying that any institution of property requires a justifying theory. The legal right must be grounded in a public belief that it is morally right. Property has always to be justified by something more basic; if it is not so justified, it does not for long remain an enforceable claim. If it is not justified, it does not remain property."

THEORIES OF PROPERTY

On the assumption that Macpherson is correct to stress the need for justifications of property regimes, the following pages will briefly review some of the principal justifications offered by political and legal theorists. This material is included principally because versions of these justifications for and/or theories about property rights appear, explicitly or implicitly, in the cases which follow, and often play a decisive role in their outcomes. This is not a course in philosophy or political theory (subjects which we are not in any event qualified to teach), so you are not expected to know the intricacies of the theories presented (since we don't know them either). But a general understanding of the ideas presented here is necessary because they do inform legal decision-making. This is not to say that any particular theory, or any combination of theories, necessarily explains why property law has taken the form that it has. Nor is reference to theory intended to suggest that particular social contexts do not inform what courts do. But even where analysis might suggest that a court is strongly motivated by a desire to attack a particular social problem, one usually finds the decision itself making reference to both precedent and theory. There is a useful and fuller review of ideas and, and justifications for, (private) property in Ziff, Principles of Property Law, chapter 1.

It should be noted that while many of these theories are intended to justify the very fact of private property, we are not concerned with the institution of private property as such. It may or may not be a good idea, but it is here, and here to stay into the foreseeable future. But acknowledging that fact does not give us an answer to all questions about the nature and extent of property rights. Even within a system in which it is acknowledged that private property provides the dominant means of resource allocation, two problems in particular may emerge.

First, someone may claim that a particular thing, not hitherto considered to be a suitable subject for private property, should be considered to be so. The courts and legal theorists must then grapple with whether to allow the claim, and on what basis. Second, even when it is acknowledged that a thing is or should be the subject of private property, there may be questions about the extent of private rights. It was this second kind of question that was at issue in Harrison v. Carswell.

1) Labour. One of the most commonly-cited justifications for private property is that it reflects the rewards of labour. The theory goes back to John Locke, and is variously referred to as the Lockean, or labour, or desert, theory. Locke argued that while originally "God ... hath given the World to Men in common ... for the Support and Comfort of their being", individuals had a natural right to their own labour. When that labour was mixed with a thing, the thing was removed from the state of nature and became the property of the individual who had worked with it. It was this process which transformed common property into individual property. Locke stated: "the grass my horse has bit, the turfs my servant has cut, and the ore I have digged in any place where I have a right to them in common with others, become my property without the assignation or consent of anybody. The labour that was mine, removing them out of that common state they were in, has fixed my property in them". Locke appended a number of qualifications and additions to this theory, to deal with the problems of limited resources and inequality of property ownership.

But we are not concerned with studying Locke, only with the general idea of awarding property rights as a reward for labour. You should look for this labour theory in particular in INS v. AP and Victoria Park, and it also arises in Caratun.

2) Occupancy or Possession. Another justification that is sometimes offered for the allocation of property rights is that of "occupancy", or possession. That is, the person who first controls or occupies land or a chattel is allocated property rights. This is a theory quite similar to labour, and is sometimes conflated with it. That is, one can argue that occupancy/possession is either a form of labour or a proxy for it. Occupancy/possession provides a good example of a theory of property that functions not as a general justification for private property, but as a justification for the assignment of particular rights to particular persons. That is, the fact that someone has occupied land cannot in and of itself persuade you that it should be permissible to have private rights in land. But once you have decided to adopt a regime of private rights in land, occupancy may well persuade you to accord those rights to the occupier rather than to another person. As we will see in the next chapter and in the later chapter on aboriginal rights, there are contexts in which these notions play a role.

3) Utility. A third principal theory about when to award private property rights is the principle of utilitarianism. This originally derived from Jeremy Bentham, who argued that the guiding principle of all social organisation should be the principle of utility - the greatest happiness of the greatest number, with happiness being measured by the excess of pleasure over pain. More particularly, happiness was said to consist of subsistence, abundance, equality and security. Bentham recognised that there could be conflicts between these ends, and he argued that subsistence and security were more important than the other two, with security pre-eminent. He stated: "unless laws are made directly for security, it would be quite useless to make them for subsistence. You may order production; you may command cultivation; and you will have done nothing. But assure to the cultivator the fruits of his industry, and perhaps in that alone you will have done enough". Thus security in the form of private property was needed to ensure subsistence.

That was how Bentham justified the fact of private property. In addition, he accepted as inevitable its corollary - inequality. While Bentham thought that equality in property was a contributor to happiness, he saw it as a distinctly lesser goal: "We cannot arrive at the greatest good, except by the sacrifice of some subordinate good .... Equality ought not to be favoured except in the cases in which it does not interfere with security .... If all property were equally divided, ... the sure and certain consequence would be, that presently there would be no property to divide. All would shortly be destroyed .... If the lot of the industrious was not better than the lot of the idle, there would be no longer any motives for industry". Bentham, however, did not simply advocate the untrammelled pursuit of acquisition. He stated that "the laws ought to do many things for subsistence which they ought not to attempt for the sake of abundance". Thus utilitarianism can in principle support a degree of expropriation, although such a policy affects the security aspect of utility.

Utilitarians offer no particular prescription for what a property regime should look like. Rather, utilitarianism says that we should employ the principle of utility as a standard against which to measure property rules. It is what might be called a kind of cost benefit analysis method of deciding where property rights should be allocated. What that method reveals should be worked out on a case by case basis; utilitarianism never requires any particular kind of answer. Utilitarian approaches emerge in some of the cases below, in INS v. AP and in Stewart in particular.

4) Law and Economics. A fourth theory about the allocation of property rights is what is often termed "law and economics". In fact, there are really two versions of law and economics. In one version the stress is on "market efficiency". Scholars in this school argue that the market is the most efficient mechanism for the production and allocation of resources, and therefore it produces the widest level of economic satisfaction for individuals. A society's private property regime should therefore incorporate maximum levels of exclusivity (make all things capable of private ownership), maximum uses (which enhances value), and maximum transferability (which increases exchange). These law and economics scholars assume that all people are rational wealth maximisers.

A second version of law and economics uses the same assumption about human behaviour, but is principally concerned to describe the consequences of legal rules. That is, it uses economic analysis to describe rather than to prescribe. It asks what people are likely to do in response to a given rule and suggests that courts and legislatures take into account such likely responses in formulating the rules in the first place. This school might say that INS v. AP is correctly decided because unless some protection is given to the producers of news copy there would be no incentive to go on producing it.

5) Freedom and Personality. The fifth general theory justifying private property is that it enhances human freedom and moral development. There are actually various versions of this. In one version we simply have a claim that private property gives the citizen freedom from state intervention and thus more individual autonomy. This is, in a sense, the flip side of the argument noted below that property confers power as against the non-propertied; it also confers power as against the state. While there is an obvious truth to the general assertion of a relationship between private property and state power, critics point out (1) that this is freedom for the few, not the many, and (2) that the argument ignores the fact that the state does intervene to protect private property. Thus far from being constrained by private property, the state is delegating its power to property holders.

Another version of the "human freedom and development" theory starts with Hegel, who argued that private property - the ability to control resources - allows humans to exert their will over the external environment and in the process to demonstrate their individuality. Indeed it was this assertion of dominance over things which liberated the personality, made human beings human. Hegel believed that all things should be capable of being made the subject of private property rights. While Hegel's theory does involve somewhat "rarefied conceptions of freedom and self determination", (Ziff, Principles of Property Law, p. 17), and is difficult to link to particular debates in property law, it does provide a general justification for private property and, therefore,

for particular grants of it in particular cases.

Some contemporary scholars have accepted the idea that control over external resources is necessary for personhood, but have argued that there is a distinction between basic entitlements (food, housing etc) and property acquired and used for exchange. The personhood argument, they say, does not justify the latter.

6) Radical Theories. Cutting across, or treating as irrelevant, all or most of the theories noted above are commentators who start from the position that, in Macpherson's words, "any system of property is a system of rights of each person in relation to other persons" and that property rights "carry with them, when they are held in quantities larger than an individual can work by himself, a power to control in some measure the lives of others". Property is power. The legal realist Morris Cohen made this point nearly 70 years ago, and went on to say that merely to recognise that private property is power is not necessarily to conclude that it is a bad thing. Rather, recognising the fact also demands recognition of a corollary fact: "it is necessary to apply to the law of property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government". Thus a factor that for some enters into the utilitarian calculus is the need to reduce such private power. Does this consideration inform Brandeis' dissent in INS v. AP?

Some people stress this power in terms of class, others in terms of gender or race. But all would argue for a regime of property rights that limits the strands in the bundle of rights held by particular individuals. Harrison v. Carswell in chapter one, and Noble and Wolf in chapter four, are obviously susceptible to analysis on these kinds of grounds. In addition, attention to property as power might mean limiting a landlord's ability to set his or her own terms in the rental market - rent controls and security of tenure for tenants. Or it might mean insisting that one spouse (usually male) who participates in the waged economy does not keep all of the fruits of that participation, but must share them with a spouse (usually female) who performs domestic labour - family property legislation. See here the Caratun case. Or, to return to the residential tenancy example, it might mean prohibiting discrimination on racial grounds in the selection of tenants.

Before leaving the topic of theories of property, two further points should be made. First, buried in the cases you will actually discern another theory, if one can call it that. Legal analysis tends at times to assume that there is an "essence" to what is property, that only things with certain attributes can be property. This is a circular argument, which ignores the fact that property is rights, not things, and those rights are awarded by those with the power to do so, including the courts. Thus to say that something is "not property" is simply to say that a court has not said that it is, not that it somehow cannot be property. Ziff correctly states that "there is no catalogue of what counts as property" and that "there is no ... indisputably settled core of what must be contained within the bundle to make a right one of property": Principles of Property Law, pp. 5 and 27.

Second, it should be stressed that there is no necessary correlation between many theories of property and the adoption of a political position that stresses the predominance of unlimited private property. True, it may be difficult to be a proponent of efficiency theory and a believer in regulation of the market and redistribution of goods, or to be concerned with issues of class, gender and race and not to advocate such positions. But labour theory, for example, can be used, inter alia, to justify giving a value to domestic labour, thereby addressing the complaints of feminists that our society fails to recognise the contribution to society that many women make in this area. Similarly, personality theory of the non-Hegelian variety is at least as much of an argument for all members of society having basic entitlements as it is for allowing unlimited acquisition by the few. Thus some theories are found in slightly different guises at different points of the political spectrum.

NOTES

1) In Pittsburgh Athletic Co. et al v. KOY Broadcasting Co. (1930), 24 F. Supp. 490 (U.S. Dist. Ct., Penn) the Pittsburgh Pirates obtained an injunction to prevent the defendants from making unauthorized broadcasts of their games from nearby leased premises which overlooked the stadium. The Pirates had given exclusive broadcasting rights to two other radio stations, rights which Schoonmaker J. described as property. He said at p. 492 that KQY's action:

"amounts to unfair competition and is a violation of the property rights of the plaintiffs. For it is our opinion that the Pittsburgh Athletic Company by reason of its creation of the game, its control of the park, and its restriction of the dissemination of news therefrom, has a property right in such news and the right to control the use thereof for a reasonable time following the games."

2) In Canadian Admiral Corporation Ltd. v. Rediffusion Inc., [1954] Exch. 382 the defendant cable company intercepted C.B.C. transmissions of Montreal Alouette games and broadcast them to its subscribers. The court held that "no matter how piratical, the taking by one person of the work of another may be, such taking cannot be an infringement of the rights of the latter unless copyright exists in the work." It then held that such copyright did exist under the provisions of the Copyright Act.

3) One commentator, while noting that the misappropriation doctrine enunciated in INS v. AP has had limited application, nonetheless approves of this decision as one dealing with "certain types of services of a fragile character, rather than products, whose commercial exploitation without destruction by immediate imitation is difficult": J.A. Rahl, "The Right to 'Appropriate' Trade Values" (1962) 23 Ohio State L. J. 56 at 57. Rahl argues that the misappropriation doctrine should not be employed against competition generally, but only against competition "where the result would be to destroy either the value created by plaintiff or the market for it". That is, "the protection ...[should] safeguard the plaintiff's opportunity to market his trade value" at all; it should not protect opportunities to increase profitability. He states: "the court's protection ... [should be] reserved for situations in which defendant's conduct threatens to destroy the opportunity to market the trade value, the prospect of which has induced plaintiff to bring it forth" (p. 63).

4) In two cases involving the Boston Marathon the Boston Athletic Association (BAA) sought to invoke the misappropriation principle. Boston Athletic Association v. Sullivan 867 F.2d 22 (lst Cir, 1989) concerned a company selling t-shirts with "Boston Marathon" written on them. The BAA was successful in enjoining this. In WCVB-TV v. Boston Athletic Association 926 F.2d 42 (lst Cir, 1991) the BAA had sold "exclusive" TV rights to one local TV station, but another one planned to broadcast the marathon simply by setting up cameras on the streets. The BAA failed in an attempt to obtain an injunction to prevent this. In the course of its decision the court stated:

"As a general matter, the law sometimes protects investors from the 'free riding' of others; and sometimes it does not. The law, for example, gives inventors a 'property right' in certain inventions for a limited period of time; ... it provides copyright protection for authors; ... it offers certain protections to trade secrets.... But, the man who clears a swamp, the developer of a neighbourhood, the academic scientist, the school teacher, and millions of others, each day create 'value' (over and above what they are paid) that the law permits others to receive without charge. Just how, when and where the law should protect investments in 'intangible' benefits or goods is a matter that legislators typically debate, embodying the results in specific statutes, or that common law courts, carefully weighing relevant competing interests, gradually work out over time". [emphasis in original]

What distinguishes the two Boston Marathon cases? What distinguishes the latter Boston Marathon case from the case cited above involving the Pittsburgh Pirates?

NOTES

1) Despite its conclusion on whether the licence was property, the court in Caratun employed the support provisions of the federal Divorce Act to award Mrs Caratun a lump sum payment of $30,000. This decision was refused leave to appeal by the Supreme Court of Canada: (1993), 46 R.F.L. (3d) 314 (S.C.C.).

2) Most Canadian decisions, and commentators, have come to the same conclusion as the Ontario Court of Appeal on this issue. For a review see N. Bala, "Recognizing Spousal Contributions to the Acquisition of Degrees, Licences and Other Career Assets: Towards Compensatory Support", (1989) 8 Canadian Journal of Family Law 23.

3) A dental practice is considered to be property for the purposes of the FLA in Ontario, and its value is usually calculated as assets plus goodwill minus liabilities. Is this inconsistent with the holding in Caratun? Pension entitlements, which will be paid in the future, are also considered to be property; is that inconsistent?

4) Professor Margaret McCallum has written: "If the essence of property is the right to exclude others from access to the benefits of ownership, then the right to practise dentistry is surely property. It is something of value to Mr. Caratun, and something which can be used to produce value"; see "Caratun v. Caratun: It Seems that We Are Not All Realists Yet", (1994) 7 Canadian Journal of Women and the Law 197. Do you agree?

far beyond the dissemination of news in the sense of current events and includes all types of factual, educational and historical data, or even entertainment and amusement": Current Audio Inc. v. RCA Corp., 337 N.Y.S. 2d 949 (Sup. Ct. 1972) at 954-56.

Conversely, the right of publicity has been upheld in situations where famous names or likeness are used "predominantly in connection with the sale of consumer merchandise or solely for purposes of trade - e.g. merely to attract attention": Presley, p. 1358. As a result, Elvis Presley posters, pewter replicas of a statue of Elvis Presley, a "Howard Hughes" game which included Hughes' name and other biographical information, and a board game utilizing the names and biographies of famous golfers, have all been found to infringe the right of publicity: see Presley, p. 1358 fn. 19. All were found to be commercial products which were not vehicles through which ideas and opinions are regularly disseminated. While Canada does not have a constitutional provision akin to the First Amendment which is applicable to the private law, no principled argument has been advanced to suggest that freedom of expression considerations should not animate Canadian courts in identifying the public interest and placing limits on the tort of appropriation of personality. Indeed, freedom of expression would seem to be a compelling and reasonably coherent basis for defining the "obvious" need for limits noted by Estey J.A. in Krouse.

In the end then, and perhaps at the risk of oversimplifying, it seems that the courts have drawn a "sales vs. subject" distinction. Sales constitute commercial exploitation and invoke the tort of appropriation of personality. The identity of the celebrity is merely being used in some fashion. The activity cannot be said to be about the celebrity. This is in contrast to situations in which the celebrity is the actual subject of the work or enterprise, with biographies perhaps being the clearest example. These activities would not be within the ambit of the tort. To take a more concrete example, in endorsement situations, posters and board games, the essence of the activity is not the celebrity. It is the use of some attributes of the celebrity for another purpose. Biographies, other books, plays, and satirical skits are by their nature different. The subject of the activity is the celebrity and the work is an attempt to provide some insights about that celebrity.

Adopted to the present case, the book in question contains 26 pages of text by Carroll together with photographs depicting Gould in posed and spontaneous moments at the beginning of his concert career. I agree with the comment on the overleaf: "They capture the passion and brilliance of Gould as pianist, the solitude of Gould as artist and the boyish nature of Gould as a young man". Although it is primarily through Gould's own images and words, this book provides insight to anyone interested in Gould, the man and his music. The author added his own creativity in recounting his time spent with Gould and in making decisions about which photographs and text to use and how they should be arranged to provide this glimpse into Gould's solitary life. There is a public interest in knowing more about one of Canada's musical geniuses. Because of this public interest, the book therefore falls into the protected category and there cannot be said to be any right of personality in Gould which has been unlawfully appropriated by the defendants.

NOTES

1) Although it was not necessary to do so, Lederman J. went on to discuss whether a right of publicity/ right of action for appropriation of personality survived the death of the subject; that is, whether it descended to heirs. He held that it did, noting, inter alia, that "[t]he right of publicity ... protects the commercial value of a person's celebrity status. As such, it is a form of intangible property, akin to copyright or patent, that is descendible.... The right of publicity, being a form of intangible property ..., should descend to the celebrity's heirs. Reputation and fame can be a capital asset that one nurtures and may choose to exploit and it may have a value much greater than any tangible property. There is no reason why such an asset should not be devisable to heirs."

Lederman J. also dismissed the estate's second claim, that it held copyright in the conversations

with Carroll. He stated that "for copyright to subsist in a work, it must be expressed in material form and have a more or less permanent endurance" and that "a person's oral statements in a speech, interview or conversation are not recognized in that form as literary creations and do not attract copyright protection".

2) An appeal to the Court of Appeal in Gould was dismissed (unreported judgment, 1998, QL [1998] O.J. no 1894, but on the basis that Carroll owned copyright in the photographs, captions and text which appeared in the book.

3) In Aubry v. Editions Vice-Versa Inc (unreported judgment, 1997, QL [1998] S.C.J. No. 30), Pascale Aubry brought an action against a photographer and a magazine for taking and publishing, without her consent, a picture of her sitting on the step of a building in downtown Montreal. The Supreme Court of Canada held that this was an infringement of the plaintiff's right to privacy under section 5 of the Quebec Charter of Human Rights and Freedoms, which reads: "Every person has a right to respect for his private life". The majority judgment of L'Heureux-Dube and Bastarache JJ. stated: "that right must include the ability to control the use made of one's image, since the right to one's image is based on the idea of individual autonomy". The right to privacy needed to be balanced against "[t]the public's right to information" and against another person's right to freedom of expression. Thus there were circumstances in which a person lost control of the right to determine when his or her image was used; one obvious example was that of a public figure acting in the public domain, another was that of someone photographed as part of a crowd scene but who was not the subject of the photograph. But in this case those considerations did not apply, and the publishers were liable even in the absence of any defamation or other prejudice.

NOTES

1) For a decision of the United States Supreme Court going the other way see Carpenter et al v. U.S., 108 S.Ct. 316 (1987).

2) For a comment on the Stewart case which discusses also the other cases we have looked at, see A. Weinrib, "Information and Property", (1988) 38 University of Toronto Law Journal 117. See also D. Doherty, "When is a Thief Not a Thief? When he Steals the Candy but Leaves the Wrapper", (1988) 63 C.R. (3d) 322. Both authors disagree with the Supreme Court's ruling. Doherty writes that the result "seems ludicrous" because criminal liability is made to depend "on whether [Stewart] ... took the package (a worthless item) along with the contents (a valuable item)". He further argues that "a consideration of the language of s.283 of the Criminal Code ..., along with the applicable policy considerations, yields the conclusion dictated by common sense: Mr. Stewart should have been convicted".

3) In R. v. MacEwen; R. v. Bell [1947] 2 D.L.R. 62 (P.E.I.S.C.) the accused were charged with theft of alcohol. The Prohibition Act, R.S.P.E.I. 1937, c. 27, s.88 provided:

> 88. No property rights of any kind shall exist in liquors unlawfully kept at any place in this Province, or in the vessels of receptacles containing the same, and in all such cases the liquors and the vessels and receptacles in which such liquors are contained, may be seized and may be ordered, by the Court or Magistrate having jurisdiction in the place where the offence was committed, to be destroyed or otherwise disposed of, such order to be made on the application of the Attorney General or counsel acting for the Crown.

In addressing the Grand Jury as to whether they could bring in a true bill of indictment, Campbell C.J. P.E.I. said: "The ... criminal law is a subject under the exclusive jurisdiction of the Parliament of Canada; but the criminal law of theft only goes to the extent of defining the offence. The offence is defined in general as being the taking of particular commodities or goods so as to deprive the owner, or some person having a special interest, of the possession or enjoyment of those goods. In other words, theft is an interference with property rights, whether absolute or limited....In order for goods to be stolen they must be the subject of property right or special interest, and the criminal law does not define what property rights are. The existence or attribute of property rights remains the subject of provincial jurisdiction....Under the Prohibition Act alcoholic intoxicating liquor, including essences, cannot be the subject of property, in whoever's possession they are, and therefore they cannot be the subject of theft.... [T]he bottles are in the same position as the essence. No matter how valuable the bottles containing the illicit liquor might be, no one has ownership of them. To summarize as to the question of theft, I don't see how a charge of theft can be made as to the essences or as to the bottles in which they are contained".

4) In R. v. Roberts (1991), 49 O.A.C. 134 (C.A.) a policeman was convicted of theft for taking the carcass of a deer killed by a motorist. The driver had called the police and asked a friend, Hueser, to collect the carcass. Hueser got there first and loaded it onto his truck. The policeman then arrived and took the carcass, eventually giving it to his girlfriend's father. Roberts appealed his theft conviction on the ground that "Mr. Hueser had no proprietary interest in the carcass of an animal ferae naturae [not domesticated] killed on a highway". In dismissing the appeal Lacourciere J.A. made two points. First:

"The prima facie presumption of law is that the person who has de facto possession has the property, and accordingly such possession is protected, whatever its origin, against all who cannot prove a superior title. This rule applies equally in criminal and civil matters. Thus a person in actual or apparent possession, but without the right to possession, has, as against a stranger or a wrongdoer, all the rights and remedies of a person entitled to and able to prove a present right to possession."

Second: "The provisions of the Game and Fish Act, R.S.0. 1980, c. 182 and the regulations thereunder are relevant with respect to this ground of appeal. The appellant argued that the driver of the vehicle or Mr. Hueser as agent did not acquire any property or interest in the carcass. However, we are satisfied that s. 31 of the Game and Fish Act and its regulations recognize the beneficial interest of a person who "acquires" an animal suitable for food. The carcass of a wild animal which has been reduced to possession is a "thing" within the meaning of s. 322 of the Criminal Code and can be the subject of theft."

5) From the cases read so far, what arguments would you make that the following should be recognized as property? Should such recognition be restricted to certain contexts only?

a) The papers of Richard Nixon seized by Congress as part of the Watergate investigation? In 1992 an American court held that Nixon owned all such material and that he must be compensated for their seizure.

b) Your spleen following its removal in an operation? See Moore v. Regents of the University of California, 249 Cal. Rptr. 494 (1988, Court of Appeals).

c) A license to operate a taxi-cab? See Re Foster (1992), 89 D.L.R. (4th) 555 (Ont. G.D.)

variety of land, premises and circumstances.

This lounge is in the middle band and in my judgment, on the evidence available, there was no sufficient manifestation of any intention to exercise control over lost property before it was found such as would give the defendants a right superior to that of the plaintiff or indeed any right over the bracelet. As the true owner has never come forward, it is a case of "finders keepers."
I would therefore dismiss the appeal.

[Eveleigh L.J. and Sir David Cairns also wrote brief concurring judgments.]

NOTES

1) The distinction between chattels on the ground, and those attached to land or buildings, referred to in Parker, was applied in Waverley Borough Council v. Fletcher, [1996] Q.B. 334. Fletcher located a gold brooch in a public park by use of a metal detector, and dug down some 9 inches to get it out. The court held that the brooch was attached to the land, and that the owner of the land thus had a better title than the finder.

2) There is obviously some uncertainty about the extent to which the finder's commission of an illegal act vitiates his or her claim: compare what is said in Bird on this point with Parker. The issue remains unresolved as a matter of common law, although criminal statutes, including the Canadian Criminal Code, resolve the problem in some cases by requiring the confiscation of the proceeds of certain crimes when the possessor has been convicted.

In Baird v. Queen in Right of British Columbia (1992), 77 C.C.C. (3d) 365 (B.C.C.A.) the court had no such statute to rely on because there was no conviction. A search of Baird's hotel room revealed some $16,000 in cash and travellers' cheques which were identified as part of the proceeds of a robbery, and which Baird admitted were so. For reasons that do not concern us Baird was not prosecuted, and nor did the robbery victim want the money back. Baird thus applied for the return of the money from the crown. His lawyer relied on Bird, and argued that Baird "is entitled to retain possession against anyone, save the person from whom he may have wrongfully trespassed in acquiring them and save any person who can prove a superior title". The court distinguished Bird "as a kind of finders keepers case where there was not that degree of criminality or culpable immorality necessary to support" a claim that illegality should be a bar to recovery. It said that despite the lack of a conviction, "the conduct of Mr Baird giving rise to his claim is so tainted with criminality or culpable immorality that as a matter of public policy the court should not assist him to recover".

Did the court find a valid ground for distinguishing Bird from Baird? Is not a case like Armory also one in which the finder knew the property was not his? In Baird the crown had the money in its possession, and made a claim for bona vacantia - literally "vacant goods", and a doctrine that holds that unclaimed property belongs ultimately to the crown. What if Baird had somehow got possession of the money again, and the court would thus not have been asked to "assist him to

recover"? What if a third party, not the true owner, had had possession?

The English Court of Appeal appears to have taken the opposite approach to the Baird court in Webb v. Chief Constable of Merseyside Police, [2000] Q.B. 427 (C.A.), a case involving a stolen car. Webb had been in possession of money that the police believed was the proceeds of drug trafficking, but he was not convicted. Conviction would have triggered confiscation of the money, but in its absence the police claimed that they could keep it if they could establish, on the civil standard, that it was the proceeds of crime. The court disagreed, holding that a conviction was required and that "[t]he illegality of the means of acquisition of the money gave rise to no public policy defence to the claimants' claim". It continued: "if goods are in the possession of a person, on the face of it he has the right to that possession. His right to possession may be suspended or temporarily divested if the goods are seized by the police under lawful authority. If the police right to retain the goods comes to an end, the right to possession of the person from whom they were seized revives. In the absence of any evidence that anybody else is the true owner, once the police right of retention comes to an end, the person from whom they were compulsorily taken is entitled to possession".

A distinction between Baird and Webb is that in the latter case the claimant did not admit to having acquired the property illegally. But Webb seems to enunciate a broader principle, and was read that way in Costelo v. Chief Constable of Derbyshire Constabulary, [2001] 1 W.L.R. 1437 (C.A.). Costelo was found in a stolen car, and it was established that he knew it was stolen. However, another man, also in the car at the time, was convicted of the theft, and the true owner was never traced. The court applied Webb, concluding that it stood for the proposition that at common law "possession means the same thing and is entitled to the same legal protection, whether or not it has been obtained lawfully or by theft or by other lawful means".

3) Property Law I students in 2000-2001 had this assignment:

The Falconer Shopping Centre is a suburban mall located in the town of Flavelle, Ontario. Recently the mall owners, Big Corp., decided that they didn't like having so many scruffily dressed young teenagers in the mall on weekends, and instructed their security staff to watch for such people and, if they didn't seem to be shopping but just "hanging around", to tell them to leave and not to come back unless they had purchases to make. Security were told to pay particular attention to teenage males, as there had been complaints from customers that they seemed threatening - although there had been no incidents of any kind. Two weekends ago Archie Adams was told by security to leave and not return, pursuant to this new policy. Although he left, he decided to ignore the second instruction, and was there again last weekend, with just $2 in his pocket with which to buy a soft drink at some point.

After he'd been inside the mall for an hour or two, Archie was walking past a music store when he looked down and saw 6 CDs lying on the ground, scattered as if they had fallen and dispersed themselves across a 1-metre area. As it happened, three of them were lying just inside the area of the store, three in the area where people walked up and down between two rows of stores. Curious, Archie went over to the CDs and bent down to look at them to see which artists were on them. In order to do this he began picking them up one by one, turning them over, and looking

at the writing on the packages. After examining the first one while holding it in his right hand, he transferred it to his left and picked up the next. While he was looking at the second one, with the other four still lying on the ground next to him, Barbara Beach, the music store manager, saw him and started to move towards him to see what was going on. At that point Archie was thinking that someone must have dropped them and, being an honest person, looked around to see if he could see any indication of who that might be. He saw, a few yards away, a young woman with a backpack that was open with a flap hanging loose, and thought it might be her. He reached for the other CDs thinking he would take them across to her, but only managed to secure two of them before Barbara came up to him. She picked up the two CDs still on the ground (they were two of the three originally lying inside the store) and grabbed for and wrenched free the four in Archie's hands. As she did so she said "Got you, you little thief".

Archie protested that he had not stolen anything, and quickly the fracas brought a small crowd of spectators and a security guard to the spot. He heard Barbara accusing Archie of stealing the CDs from the store, and Archie saying that he had just picked them up from the floor to return to the young woman with the backpack; as he said this he pointed at her, as she was among the small crowd drawn to the spot. The security guard decided to deal with the matter more privately, and took Archie into a nearby office. He asked Barbara and the young woman with the backpack to come also, and when they were all in the office he called the police.

The subsequent police investigation revealed that the CDs did not belong to the young woman, and neither were they from the music store. As a result, the police decided there were no grounds to charge Archie with theft. They also decided that they should take custody of the CDs as lost property, although they doubted that anybody would bother to go to the police station and reclaim them. While the police were conducting this investigation the security guard recognised Archie as someone who had been told to leave the previous weekend, and told him again to leave and not return unless he was shopping.

When he got home Archie told this story to his older sibling (you). Mostly, he was relieved that he hadn't been charged with theft, as he doubted that either the police or the courts would believe his story. He thought it very fortunate for him that the CDs were not from the music store. But you are angry at the way he was treated, and, having read the property casebook up to page 91, think he is entitled to the CDs. To be certain, though, you decide to write a memo on the issue of entitlement to the CDs, and to cover all your bases decide to operate on the assumption that either or both of Barbara Beach, on behalf of the store, and Big Corp, might also claim them.

C) INTRODUCTION TO ADVERSE POSSESSION

INTRODUCTORY NOTE

As we will see in chapter 4, the common law maintains the fiction that the ultimate ownership of all real property lies in the Crown, and no individual can "own" land. Instead, individuals have "title"to land, which can be defined as a right to all uses of real property. Nowadays title is invariably asserted through a document - a conveyance or a will. But historically possession was a very significant part of the law of title. First, in and of itself it provided a method of acquiring title to unoccupied lands. At common law factual possession, including possession which has no obvious rightful origin, gave a title to the possessor. Second, possession also provided a method of proving title against other claimants, of reinforcing title. In the medieval period possession was called seisin, and seisin was "fact not right". It "expressed the organic element in the relationship between man and land and as such provided presumptive evidence of ownership": Gray, Elements of Land Law, p. 53. Possession, it is often said, was the root of title.

This initial description of title at common law would not be complete without also noting an important corollary of it - that title to land at common law is relative. It cannot be absolute because the Crown owns all land, and therefore it was, and is, pointless to ask a court to decide who owns the land. Instead, one asked the court - of the two disputants before you, who has the better title? This can be illustrated by a simple example. A sold land to B who never occupied it; C occupied the land as vacant land; C was then forcibly dispossessed by D. B, C, and D all have a title, but some titles are better than others. C could sue D for recovery of the land, and if C did so the court would not inquire into whether there was somebody out there with a better title than C. B must take an action on his or her own account. C may have had no "right" to occupy the land, but "a wrongful possessor will be able to defend his possession against trespassers and adverse claimants who have no better right": McNeil, Common Law Aboriginal Title, p. 15.

While it fulfills nothing like as important a role as it once did, possession remains important in the common law of title to real property. Conceptually in registry systems (more on which below), "modern conveyancing rests to some degree on the assumption that proof of continued de facto enjoyment of land by the vendor and his predecessors provides a good root of title for the purchaser": Gray, Elements of Land Law, p. 59. More importantly for current purposes, it remains possible to acquire title to land at common law, good against all the world, through long possession. One way in which this can be done is through the doctrine of aboriginal title, dealt with extensively later in the course. But it can also be done through the law of adverse possession.

Briefly, since the requirements for adverse possession are what the rest of this chapter is about, adverse possession means that uninterrupted enjoyment of land of the correct nature over a period of time stipulated by law by a squatter (non-owner) deprives the owner of his or her title and effectively gives to the squatter a title to the land, a title better than all others.

There are therefore two principal aspects of adverse possession law. The first is that of time. All jurisdictions in which it is possible to obtain title by adverse possession provide a statutory period during which a person claiming a title to land must act to recover the land from a wrongful possessor. That is why the rules relating to adverse possession are in the Limitations Act, R.S.O.

1990, c. L-15. A claim of title by adverse possession is thus a defence to an action by someone with "paper title". Not all jurisdictions have the same time period. The following provisions tell you, inter alia, what the time period is in Ontario, and what "starts the clock running":

4) No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

5) (1) Where the person claiming such land or rent, or some person through whom that person claims, has, in respect of the estate or interest claimed, been in possession or in receipt of the profits of the land, or in receipt of the rent, and has, while entitled thereto, been dispossessed, or has discontinued such possession or receipt, the right to make an entry or distress or bring an action to recover the land or rent shall be deemed to have first accrued at the time of the dispossession or discontinuance of possession or at the last time at which any such profits or rent were so received.

5) (9) Where the person claiming such land or rent, or the person through whom that person claims, has become entitled by reason of any forfeiture or breach of condition, such right shall be deemed to have first accrued when the forfeiture was incurred or the condition broken.

13) Where any acknowledgement in writing of the title of the person entitled to any land or rent has been given to him or to his agent, signed by the person in possession or in receipt of the profits of the land, or in the receipt of the rent, such possession or receipt of or by the person by whom the acknowledgment was given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent the acknowledgment was given at the time of giving it, and the right of the last-mentioned person, or of any person claiming through him, to make an entry or distress or bring an action to recover the land or rent, shall be deemed to have first accrued at and not before the time at which the acknowledgment, or the last of the acknowledgments, if more than one, was given.

15) At the determination of the period limited by this Act to any person for making an entry or distress or bringing any action the right and title of such person to the land or rent, for the recovery whereof such entry distress or action, respectively, might have been made or brought within such period, is extinguished.

16) Nothing in sections 1 to 15 applies to any waste or vacant land of the Crown whether surveyed or not, nor to lands included in any road allowance heretofore or hereafter surveyed and laid out or to any lands reserved or set apart or laid out as a public highway where the freehold in any such road allowance or highway is vested in the Crown or in a municipal corporation, commission or other public body, but nothing in this section shall be deemed to affect or prejudice any right, title or interest acquired by any person before the 13th day of June, 1922.

36) If at the time at which the right of a person to make an entry or distress, or to bring an action to recover any land or rent, first accrues, as herein mentioned, such person is under the disability of minority, mental deficiency, mental incompetency or unsoundness of mind, such person, or the person claiming through him or her, even if the period of ten years or five years, as the case may be, hereinbefore limited has expired, may make an entry or distress, or bring an action, to recover the land or rent at any time within five years next after the time at which the person to whom the right first accrued ceased to be under any such disability, or died, whichever of those two events first happened.

Note that while possession by the adverse possessor must be continuous for the period of time, this does not mean that the same person must possess the land for all of that time. Provided there is no gap in possession, the rights acquired by the potential adverse possessor, the "inchoate possessory title", can pass from one person to another so that at the expiry of the limitation period

"the last successor being then in possession will acquire a title in fee simple good against all the world including the true owner": per Bowen C.J. in Mulcahy v. Curramore Ply. Ltd. [1974] 2 N.S.W.L.R. 464 (C.A.). See also McRuer C.J.H.C. in Fleet v. Silverstein (1963), 36 D.L.R. (2d) 305 (Ont. H.C.): "[T]here is abundance of authority that is binding on me that where there has been adverse possession by 'A' as against 'B' which is surrendered to 'C' and 'C' immediately enters into possession of a right which has been handed over to him by 'A' the Statute of Limitations continues to run against the true owner".

The converse to this is also well established: that is, that if a squatter abandons the land before the expiry of the limitation period the title holder "regains" full rights. He or she does not have to bring an action for recovery (there being no one in possession against whom to bring such action), nor will a later adverse possessor get the advantage of the previous possession unless his or her entry was substantially continuous with the previous squatter's departure: see The Trustees, Executors and Agency Co. Ltd. v. Short (1888), 13 App. Cas. 793 (P.C. - N.S.W.).

You might think about how these points help to illustrate the introductory comments above about possession being the root of title and about the relativity of title. The "trespasser" who has not stayed the correct amount of time has still acquired something, even if it is not a title that can be passed on other than by the successor immediately possessing the land.

The existence, and indeed the value, of an "inchoate possessory title" is illustrated by Perry v. Clissold, [1907] A.C. 73 (P.C - N.S.W.). Under New South Wales expropriation legislation the government issued a notice of expropriation to one Fredrick Clissold in 1891. Nothing further was actually done with the land, although the legislation provided that publication of the notice was sufficient to convey all rights in the land to the government, and Clissold died in 1892. In 1902 Clissold's heirs demanded compensation, but the Minister refused when it turned out that Clissold had entered the land in 1881. Although he fenced it and treated it as his own, and likely had sufficient "quality of possession" to obtain full title, he clearly did not have sufficient "quantity of possession" under the applicable statute. The case went to the Privy Council on the narrow question of whether a prima facie case for compensation was disclosed on the facts, and the court held that it was. "It cannot be disputed", Lord MacNaghten said, "that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner". The expropriation legislation provided for compensation "to every person deprived of the land" and "it could hardly have been intended ... that the Act should have the effect of shaking titles which ... would in process of time have become absolute ... or that ... Ministers ... should take advantage of the infirmity of anybody's title in order to acquire his land for nothing".

the facts of a particular case....

[T]he presumption of ownership must remain with the holder of the documentary title and it is for the adverse claimant to prove the constituent elements of his claimed possessory title. This, in my view, has not been done here because neither openness nor notoriety of possession has been demonstrated. The land in question is wooded and undeveloped, and is what is referred to in many of the cases as "wilderness" land. There was no actual knowledge in Bowater or Lundrigans of the existence of the cabin and I do not think that constructive knowledge can or should be imputed. The evidence is clear that the cabin was well hidden (and I do not infer that this was done deliberately) because it could not be seen from the air as far as we know, nor from the nearby river or ground area. That it was almost totally obscured may also be deduced from the fact that its location was unknown despite its proximity to CornerBrook, the Humber River and the Trans Canada Highway. Neither did the respondents bring forward any real evidence of knowledge in any other persons besides themselves and, presumably, their immediate families. In all of these circumstances, there is, in my view, insufficient evidence of open or visible or notorious possession within the meaning given these words by the Courts, so as to dispossess the legal title holder. I must, therefore, with respect, find that the learned trial Judge erred in fact and in law in reaching the conclusion he did. His order for the issuance of a restricted certificate of title must therefore be set aside and an unqualified certificate granted to the appellant for the land claimed by it.

NOTE

The judgment in Lundrigans states that not only did the trial judge hold that the squatters had the right quality of possession, he also gave them title to "a considerably larger parcel of land" than just the cabin. This was incorrect. An adverse possessor will normally gain title only to the land occupied, not to other land covered by the real owner's title.

However, if a person enters land under a defective title, and adversely possesses only part of the land for the requisite period, he or she will be considered to have been in constructive possession of the whole. This is called the doctrine of colour of title. See Wood v. Leblanc (1904), 34 S.C.R. 627 per Davies J. at 644: "the possession necessary under a colourable title to oust the title of the true owner must be just as open, actual, exclusive, continuous and notorious as when claimed without such colour, the only difference being that the actual possession of part is extended by construction to all the lands within the boundaries of the deed but only when and while there is that part occupation."

E) ADVERSE POSSESSION AND THE INCONSISTENT USE TEST: JUDICIAL REPEAL?

INTRODUCTORY NOTE

In recent years a series of cases, in England and Canada, have appeared to restrict the ambit of adverse possession doctrine by giving a new meaning to what makes possession "adverse". The traditional position can be summarised simply as a restatement of the principles outlined above: exclusive possession as an ordinary owner would possess for the statutory period of time is adverse to the title holder. Or, as it was put in Treloar v. Nute [1976] 1 W.L.R. 1295 (C.A.), "if a squatter takes possession of land belonging to another and remains in possession for ... [the statutory period] to the exclusion of the owner that represents adverse possession". The new approach of requiring that the squatter's use be "inconsistent" with that of the title holder is illustrated by Masidon Investments.

MASIDON INVESTMENTS V. HAM (1984), 45 O.R. (2d) 563 (C.A.)

The judgment of the court was delivered by BLAIR J.A.: This appeal concerns a claim for possessory title to land. Specifically, the issues are whether the use made of the land by the appellant, the trespasser, was inconsistent with the use of the respondents, the legal owners, and whether the appellant had the required animus possidendi, the intention to exclude the respondents from possession. The Honourable Mr. Justice Carruthers rejected the appellant's claim and this appeal is taken from his decision....

The relevant facts, as found by Carruthers J. in his full and careful discussion of the evidence, can be briefly set out. The appellant, in 1956, became the tenant of an approximate 100-acre parcel of land owned by Louis Mayzel, located on the north side of the Queen Elizabeth Highway near Oakville. The land was mortgaged by Mayzel to a mortgagee who was a trustee for a group of investors consisting of the respondents or their predecessors in title. On September 26, 1967, the mortgagee registered a final order of foreclosure against the parcel. As a result of subsequent negotiations between the mortgagee and Mayzel, title to the west half of the 100-acre parcel was conveyed to a company controlled by Mayzel. Title to the east half, the lands in dispute in this appeal, remained in the mortgagee and in 1968 was conveyed to the respondents. The appellant continued as a tenant of Mayzel. The residence he occupied throughout is located on the west half but most of the other farm buildings and the access road leading to the residence are located on the disputed east half.

The appellant operated an airport consisting of two grass runways on the disputed property. The first runway was laid out in the late 1950s and early 1960s; the second runway was constructed between 1966 and 1972 and required extensive ditching, grading and the addition of dozens of large truckloads of fill. The appellant maintained the runways by regular cutting and the addition of fertilizer, loam and seed. A wind-sock, visible from the highway, was flown from a silo on the disputed property. Some time before 1960, the appellant constructed a small building for use as a hangar. An area of approximately five to seven acres was provided as a parking-space for aircraft. There was also an automobile parking-lot.

The airport was not operated commercially for use by the public but was restricted by the appellant for the private use of himself and his friends. Those using it were charged one bottle of Scotch whisky a month and were required to sign a release. The airport had no aircraft servicing facilities, radio or navigational aids. At the time of the trial, the number of aircraft using the airport averaged between 10 and 12. It was used year-round with the exception of a period of up to four weeks in the spring and the fall when conditions were muddy. Winter use was limited because there was no equipment to clear or roll snow. The airport was listed in publications and maps of various organizations including the Federal Department of Transport, Flying Farmers, Emergency Measures Organization and the military services.

The appellant and his family used the balance of the property for recreational and other purposes. He built a dam

NOTES

1) The inconsistent use test has given the courts problems in certain contexts. In Keil v. 762098 Ontario Inc et al (1992), 91 D.L.R. (4th) 752 (Ont. C.A.) one party bought a lot of residential land and applied for a severance of part of it, for development purposes. In litigation over this severance it turned out that a neighbour was using part of the lot as a driveway, and had done so for over 20 years before the title owner bought the land. The Court of Appeal agreed with the title holder's argument that recent cases, especially Masidon Investments, had made it necessary "to demonstrate that use of the land by the occupant in possession is inconsistent with the form of use and enjoyment that the titled owner intended to make of it". The court summarised the title owner's argument thus: "the intended use was ... retention of the land in its present form until eventual development as a separate residential parcel. This use ... is not interfered with by the laying of gravel and the passage of vehicles". But the court also stressed that the owner's intention must relate to the time during which the limitation period was running. In this case the title owner had no intention when the period was running, because it did not own the land then. It was the prior owner's intention that mattered, and no evidence had been led on that. Does this mean that the inconsistent use test actually helps adverse possessors when the title changes hands?

In Georgco Diversified Inc. v. Lakeburn Land Capital Corp. (1993), 31 R.P.R. (2d) 185 (Ont. G.-D.) the plaintiff Georgco owned five contiguous plots of land on Hayden Street in Toronto, a street parallel to and south of Bloor Street East. The defendant Lakeburn owned land immediately to the north, on Bloor. Since 1953 the plaintiff and its predecessors in title had effectively occupied a strip 81 feet long and between two and a half and four and a half feet wide which according to registered surveys belonged to the defendant and its predecessors in title. Counsel for the defendant conceded that "the disputed lands have for a period of more than ten years been occupied by the plaintiffs and incorporated as part of the backyards of the plaintiffs' houses, have been landscaped as part of such backyards, and appear to have been boarded by fences". The trial judge held that the plaintiffs had had actual possession. Counsel for the defendant relied on Masidon Investments, arguing that "in order to establish that the claimant to adverse possession has effectively excluded the true owner from possession, the use by the claimant must be inconsistent with the intended use of the property by the true owner" and that "if the true owner had no intended use of the disputed land, the claimant cannot satisfy the test of effective exclusion". Ground J. (really!) accepted that Masidon Investments was the case to be followed, and said this about the owner's intended use: "The evidence before this court would seem to indicate that, if [the defendant] ... had any intention at all with respect to the disputed lands, its intention as to use, at the highest, would be that no one should make use of the lands".

Given this conclusion, has the plaintiff established adverse possession?

2) There is language in Masidon Investments deprecating the fact that Ham deliberately tried to get the land via adverse possession. Is it appropriate to introduce notions of "fault" into this area of the law? In Lehal v. Murray [2001] O.J. No.4861 (S.C.) Van Melle J., having found that the possessors' predecessor in title did not have exclusive possession and that therefore there had not been ten years of possession of the requisite quality, went on to say that the claimants would not have been entitled even if they had been there ten years. The judge's reasons on this point rely heavily on the fact that the Murrays knew it was not their land, but they nonetheless used it. This

fact "disturbed" the judge, who believed that "once the Murrays understood the concept of adverse possession", they set out to establish it and to enlarge their claim. The judge said: "Adverse possession is not a mechanism whereby someone can convert to his or her own use property beoinging to his or her neighbour. This is not a case of mutual mistake or inadvertence. There is a course of conduct by the Defendant and her husband apparently designed to appropriate property belonging to someone else.... [Their actions were] entirely consistent with a course of conduct designed to 'take over' someone else's property, but not consistent with a legitimate claim for adverse possession".

3) Possessory Title and Appurtenant Rights. The successful adverse possessor acquires only the land itself and not any rights appurtenant to it. The leading case is Wilkes v. Greenway (1890), 6 T.L.R. 449 (C.A.). Greenway had acquired land previously belonging to Wilkes by adverse possession, but needed to use a private road belonging to Wilkes in order to reach that land. He argued that he had also acquired an easement of necessity consisting of a right of way via the road. (We will deal with easements in a later chapter). The Court rejected Greenway's argument, noting that "there is nothing in the Statute of Limitations to create ways of necessity. The statute does not expressly convey any title to the possessor. Its provisions are negative only. We cannot impart into such negative provisions doctrines of implication [of easements of necessity]".

4) Adverse Possession and Systems of Recording Title. It was noted in the introduction to St Clair Beach that there are two systems of recording title to land in common law Canada. It is not difficult to see that adverse possession is incompatible with the policy of a Land Titles system. As Williams, Limitation of Actions in Canada, explains: "The institution of acquisition of land by long possession is designed to enable the general public to rely upon the status quo. It invests the apparent relation of various persons to land with an authority that they would not otherwise have. On the other hand the Torrens system of registration of land has the aim of ensuring that reliance on the register will be well-founded. It enables reliance on the legal formality of registration. Therefore, whereas the institution of acquisition of title by adverse possession encourages reliance on the state of facts relating to the land, the system of registration of title encourages reliance upon a legal construction."

The result is that all land titles statutes, except that of Alberta, declare the Land Titles system to be paramount to the Limitations Act: see, for example, Land Titles Act, R.S.O. 1980, c. 230, s. 54 (1). The position in Alberta is explained in Williams, Limitation of Actions in Canada:

"Alberta's legislation was essentially equivocal on the matter of which statute should govern. The choice of the other provinces in this respect was not adopted in Alberta. In Alberta a long line of decisions concluded that the Torrens system was subject to the exception of allowing the adverse possessor to be registered as the estate holder at the expiry of the limitation period. Alterations in the Land Titles Act have subsequently been made so as to entrench the dominance of the Limitation of Actions Act. The mechanics of the Alberta system are that the plaintiff adverse possessor must obtain a declaratory judgment recognizing his title and after a lapse of three months, if no appeal is launched, the Registrar is empowered and bound to register the adverse possessor as an estate owner."

CHAPTER FOUR

INTRODUCTION TO THE COMMON LAW OF REAL PROPERTY

THE DOCTRINES OF TENURE AND ESTATES

A) INTRODUCTION TO TENURE AND ESTATES

Although much of the system of tenure explained below is obsolete, a basic understanding of the historical origins of the English law of real property is indispensable to an understanding of the conceptual bases of that law in common law Canada. As in England, land "owners" in Canada are still not true owners, but are tenants in fee simple of the crown.

K. Gray, Elements of Land Law

It is not easy to imagine, tabula rasa, how best to construct a coherent and systematic body of rules governing rights in and over land. During the course of eight centuries, English law has developed a framework of rules which functions today with admirable success, but it is far from obvious that, if the task of construction were begun again, the end result would necessarily resemble the law of real property in its present form. The conceptual points of departure which lie at the back of the law of real property contain little, if anything, of a particularly compelling or a priori nature. There is indeed nothing inevitable about the eventual shape of modern land law, but it remains true that the law of today is still heavily impressed with the form of ancient legal and intellectual constructs .... From its earliest origins land law has comprised a highly artificial field of concepts, defined with meticulous precision, with the result that the inter-relation of these concepts is not unlike a form of mathematical calculus. The intellectual constructs of land law move, as Professor Lawson once said, ' in a world of pure ideas from which everything physical or material is entirely excluded'. The law of land is logical and highly ordered, consisting almost wholly of systematic abstractions which 'seem to move among themselves according to the rules of a game which exists for its own purposes.' It is from this interplay of naked concepts that the creature of modem land law ultimately derives. English law cannot be properly understood except in the light of its history, and it is in the doctrines relating to tenures and estates that the historical roots of English land law are to be found.

The Doctrine of Tenures The origin of the medieval theory of English land law was the Norman invasion of England in 1066. From this point onwards the King considered himself to be the owner of all land in England. Since the Normans brought with them no written law of land, they initiated in their newly conquered territory what was effectively a system of landholding in return for the performance of services. According to this feudal theory, all land was owned by the Crown and was granted to subjects of the Crown only upon the continued fulfillment of certain conditions. Land was never granted by way of an actual transfer of ownership, and the notion of absolute ownership other than in the Crown was therefore inconceivable. Pollock and Maitland were later to explain quite simply that all land in England 'must be held of the king of England, otherwise he would not be the king of all England'. In their view, to have wished in medieval times for an ownership of land which was not subject to royal rights was 'to wish for the state of nature'.

It was a direct consequence of this theory that all occupiers of land were at best regarded as 'tenants', i.e. as holders of the land who in return for their respective grants rendered services of some specified kind either to the King himself or to some immediate overlord who, in his turn, owed services ultimately to the Crown. In this way there emerged a feudal pyramid, with the King at its apex and it was the doctrine of tenures which defined the terms of the grant on which each tenant enjoyed his occupation of 'his' land.

The Creation of Estates: Presumptions and Words of Limitation

An individual owning a fee simple estate can obviously choose, when divesting him or herself of it, to simply give the full fee simple estate to the grantee - to "create" a fee simple estate. Or he or she could choose to give some lesser estate, such as a life estate, to the grantee - to "create" a life estate. And if the words used in the will or conveyance (deed) are clear as to what is being transferred, there will be no problem in determining what was intended.

But what if the terms of any instrument - an inter vivos transfer or a will - left uncertain what was intended? Because of the importance of land in the medieval world the common law required strict adherence to conveyancing formulae if a person wished to transfer inter vivos an estate in fee simple. The grant had to say: "to A and his heirs." Any other form of words - "to A in fee simple, to A forever, to A and his successors" - would create only a life estate.

Note that in the phrase "to A and his heirs" the words to "to A" are known technically as words of purchase, words that designate the person to whom the interest is granted. The words "and his heirs" are called words of limitation, words that designate the nature of the interest granted.

The strict common law rule on conveyancing has long been altered by statute. The Conveyancing and Law of Property Act, R.S.O. 1990, c. C-34, s. 5 states:

5 (1) In a conveyance, it is not necessary, in the limitation of an estate in fee simple, to use the word "heirs".

(2) For the purpose of such limitation, it is sufficient in a conveyance to use the words "in fee simple" or any other words sufficiently indicating the limitation intended.

(3) Where no words of limitation are used, the conveyance passes all the estate, right, title, interest, claim and demand that the conveying parties have in, to, or on the property conveyed, or expressed or intended so to be, or that they have power to convey in, to, or on the same.

(4) Subsection (3) applies only if and as far as a contrary intention does not appear from the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.

(5) This section applies only to conveyances made after the 1st day of July, 1886.

The alienation of realty by will was treated differently at common law. Land was not devisable at all until the passage of the Statute of Wills, 1540, and thereafter the courts took a more lenient view of the need for correct words of limitation, a view based on the rule that wills are to be construed in an attempt to find the true intention of the testator or testatrix. A similar provision to the one cited above is now to be found in the Succession Law Reform Act, R.S.O. 1990, c. S-26, s. 26, which states:

26. Except where a contrary intention appears by the will, where real property is devised to a person without words of limitation, the devise passes the fee simple or the whole of any other estate or interest that the testator had power to dispose of by will in the real property.

(C) PRESENT AND FUTURE INTERESTS

The preceding pages demonstrate that the estates system recognizes a variety of different interests in land. The next sections will show that the common law also allows for conditional estates, interests in land which may either not arise until the happening of a certain event or which may be terminated in the future by the occurrence of a certain event. Once we know that it is possible to have an interest in land less than the fee simple absolute (life estate, fee tail, conditional fee simple), the next question is - what happens to the rest of the fee simple absolute in any given piece of realty? The answer is that the law recognizes future interests in land, interests held by persons other than those in possession in the present. In fact, the common law recognizes two types of future interests: a reversion and a remainder.

A reversion is any interest retained by the grantor: for example, in the grant "to A for life" the grantor, assuming that he or she holds the fee simple absolute, has not disposed of his or her full interest. The grantor has a reversion in fee simple. A reversion does not need to be specified, it arises by operation of law from the failure by the grantor to alienate the entire interest.

A remainder is an interest created in a third party which follows the granting of an estate less than the fee simple absolute. For example, in the grant "to A for life, then to B", B has a remainder in fee simple but no right to possess the land until A dies. Note that in this example the grantor has no reversion -- he or she has given away the full fee simple.

K. Gray. Elements of Land Law

Through the doctrine of estates the common law was able to organise the allocation of certain powers of management, enjoyment and disposition over land in respect of particular periods or 'slices' of time. Moreover, as the law of real property became distanced from the physical reality of land and entered a world of almost mathematical abstraction, it was possible to accord an immediate conceptual reality to each 'slice' of time represented by an 'estate'. In other words, any particular 'slice' of entitlement in the land could be viewed as having a present existence, notwithstanding that its owner was not entitled to possession of the land until some future date. In a world of concepts it was quite easy to conceive of rights to successive holdings of the land as 'present estates coexisting at the same time'. It was ultimately this feature of the time-related aspect of the 'estate' in land which made it possible for the common lawyer to comprehend the notional reality of immediate dispositions of, and dealings with, future interests in land ....

Precisely because the doctrine of estates recognised the feasibility of successive estates in the same land, rules were developed ... to restrain the current estate owner from prejudicing the value of the land in the hands of any successor (or 'remainderman'). These rules took the form of a doctrine relating to 'waste', 'waste' being deemed as any action or inaction on the part of the estate owner which altered the physical character of the land. Waste can be committed in several ways, although not all forms or waste lead to any legal remedy. The courts have been unwilling, for instance, to restrain the commission by a tenant for life of ameliorating waste, which merely has the effect of improving the land and of enhancing its value. Only if the terms of his grant so stipulate can a tenant may be made liable for permissive waste, which comprises defaults of maintenance and repair leading to the dilapidation of buildings situated on the land. More serious is voluntary waste, which includes any positive diminution of the value of the land (for instance, by quarrying or by the cutting of timber). A tenant for life is liable for such waste unless the terms of his grant give him specific exemption by declaring him 'unimpeachable for waste'.

PROBLEMS

In formulating your answers to these questions consider both what kind of estate a person has, and whether it is one of present or future possession.

1) A has a fee simple estate and executes a deed stating: "I give my land to B". What estate does B have, and why?

2) A has a fee simple estate and makes a will stating: "to B for life, and on the expiry of B's life to C for life". What interests do A, B and C have?

3) A has a fee simple estate and makes a will stating: "I give my land to B for the life of C, then to D for life, then to E. What interests do A, B, C, D and E have? What happens if B dies before C?

D) INTRODUCTION TO CONDITIONAL ESTATES

We have seen that estates in land are temporal 'slices' of the rights to the possession, use and enjoyment thereof. So far we have considered these estates as 'absolute', as belonging unconditionally to someone. Estates may, however, be granted subject to conditions. Conditions can be of two kinds.

Conditions Precedent. First, there can be conditions of eligibility, or what are known technically as conditions precedent. These must be satisfied before the grantee has any right of enjoyment at all. For example: 'to A at 21', or 'to B for life if she should marry Y. Until A turns 21, or until B marries Y, they have only what are called contingent interests. If either die before the condition is met, or if the condition becomes impossible of performance (for example, if Y dies before B marries him) the interest will be extinguished and there is nothing that can pass to heirs. Conversely, if A becomes 21, or if B marries Y, then the condition is satisfied and the interest becomes a vested interest.

This does not mean that the owner of a vested interest has an immediate right to possession. That is the case in the two examples given above, but it is not so in the grant "to A for life, then to B for life if she reaches 21". At the time of the grant, assuming B is not 21, her interest is contingent. If she reaches 21 while A is still alive, her estate becomes vested in interest, but she has no right to possession until A dies.

It should be noted here that the common law generally favours early vesting where there is any doubt about whether a grantor or testator/testatrix intended to create a vested or contingent interest. Mackay v. Nagle et al (1988), 30 E.T.R. 191 (N.B.Q.B.) illustrates this point. The testator left his property to his wife for life "and thereafter to my living children in equal shares". His four children were alive when the will took effect, but one died during his widow's lifetime. Did the word "living" mean children alive at the time the will took effect, in which case the now-deceased child's interest would be vested and would descend to his heirs? Or did it mean living at the time the widow's life estate expired, in which case it would be a contingent interest, the condition precedent being surviving the widow? In coming to the conclusion that the interest was vested, the court considered extrinsic evidence of the testator's intention when the will was made. But it relied largely on a series of cases establishing the principle that, in ambiguous cases, "the courts generally follow a rule of construction favouring early vesting".

Conditions Subsequent. The second kind of condition, the one that will principally concern us here, is a condition of defeasance, known as a condition subsequent. These operate to defeat an estate which has already vested. For example: 'to C in fee simple, but if he ever becomes a member of the Law Society of Upper Canada, to D in fee simple'. If C acquired the land in 1960 with this condition attached, the estate was vested at that time but was liable to be divested at a future date if C became a lawyer. These conditions of defeasance are personal; if C died in possession and never having joined the legal profession, his heirs will inherit a fee simple absolute. Such an estate is known as a fee simple defeasible on condition subsequent, or, occasionally, a fee simple vested subject to divestment.

The fee simple defeasible on condition subsequent is not the only estate which may be made subject to a condition of defeasance. Such a condition is also incorporated in a determinable fee, sometimes called a fee subject to a limitation. The conceptual difference between a determinable fee and a fee simple defeasible on condition subsequent is not easy to grasp. The defeasible estate is premised on the notion that the grantor has given away a full estate, while providing for a possibility of later termination via the condition. The determinable estate, however, is considered to be ab initio something less than a full fee simple estate. The condition is considered part and parcel of the fee simple, not a separate condition that may end it.

Unfortunately, it is easier to state the conceptual distinction between these two types of fees than it is to tell them apart in any given form of words in a grant. The courts have tended to rely on looking for certain formulae: some phrases will invariably lead to a finding that a defeasible fee was intended, others to a conclusion that the grant creates a determinable fee. Examples are given in the extract from Megarry and Wade below. An apt summary of this area of the law was provided by Porter, M.R., in Re King's Trusts (1892), 29 L.R. Ir. 401 at 410 where he called the defensible/determinable distinction "little short of disgraceful to our jurisprudence.'

However disgraceful it may be, the distinction cannot be ignored because there are a variety of consequences to deciding whether an estate is defeasible or determinable. We will not deal with all of those consequences. However, two points should be noted.

First, the two fees give the grantor different rights in reversion. When a grantor creates a defeasible fee he or she is left with what is known as a right of re-entry. This gives the grantor, when the condition is broken, the right to end the grantee's estate: the grantee's estate is not automatically terminated. Conversely, a fee simple determinable is automatically ended if the event specified occurs - this right in the grantor is called a possibility of reverter. The difference between these two reversions - one a right to end the estate and the other an automatic termination of it - flows from the conceptual difference between the two conditional fees.

Second, one has to be able to tell the two fees apart because there are rules limiting the types of conditions that can be imposed on an estate. As we will see, this has come primarily to mean that a condition must not be uncertain and nor must it contravene "public policy". As is the case when the holder of a conditional estate breaks the condition, there are different consequences depending on whether the fee is determinable or defeasible when the condition is of the type that the law considers invalid.

If the condition is attached to a determinable fee simple, and is found to be invalid, the estate is entirely void and reverts to the grantor. Again, this is because of the nature of determinable estate in which the condition is part and parcel of the fee. However, if the condition is attached to a fee simple defeasible on condition subsequent, and the court holds the condition to be invalid, the condition only is struck, and the grantee takes the estate free of the condition.

While we have used the term "fee simple" here, any estate can be made subject to conditions.

Sections (e) and (f) of this chapter deal with why some conditions are invalidated. For now, read the following note and case on deciding whether a conditional fee is defeasible or determinable.

Megarry and Wade, The Law of Real Property The difference between a determinable fee and a fee simple defeasible by condition subsequent is not always easy to discern. The essential distinction is that the determining event in a determinable fee itself sets the limit for the estate first granted. A condition subsequent, on the other hand, is an independent clause added to a limitation of a complete fee simple absolute which operates so as to defeat it. Thus a devise to a school in fee simple "until it ceases to publish its accounts" creates a determinable fee, whereas a devise to the school in fee simple "on condition that the accounts are published annually" creates a fee simple defeasible by condition subsequent. Words such as "while," "during," "as long as," "until" and so on are apt for the creation of a determinable fee, whereas words which form a separate clause of defeasance, such as "provided that," "on condition that," "but if," or "if it happen that," operate as a condition subsequent.

RE MCCOLGAN, [1969] 2 O:R. 152 (H.C.J.)

KEITH, J.: The Guaranty Trust Company of Canada, as the executors of the last will and testament and trustees of the estate of the late Dr. James W. McColgan, seek the advice and direction of the Court on eight questions arising out of the language used by the testator in one paragraph of his will.

The circumstances which gave rise.to the present application are related in the affidavits of the respondent Mary Kovalchick and of David Ernest Morrow, a trust officer in the employ of the applicant. The respondent Mary Kovalchick states that she first became acquainted with the late Dr. McColgan as his patient in the year 1928 at which time she was 18 years of age and Dr. McColgan was the only medical practitioner in the Town of Sagamore, Pennsylvania. The respondent and the testator became, in her words, "great and good friends which relationship lasted up to the date of his death". The respondent says, however, that between the years" 1928 and 1958 when Dr. McColgan retired and moved to Toronto permanently, "We were frequently in each other's company and the question of marriage was discussed between us on many occasions but because of religious differences no ceremony was ever performed." She continues in her affidavit sworn on November 22, 1968:

4. In 1968, Dr. McColgan retired from the practice of medicine and came to Canada for his retirement alone at which time he occupied his residence at 39 Arjay Crescent, Willowdale, which he had purchased in 1956 or 1957 and in which he resided up to the time of his death.

6. When the doctor retired to Ontario from Sagamore, Pennsylvania, he left me a power of attorney for the purposes of collecting his outstanding accounts and otherwise winding up his medical practice and, after the said medical practice was wound up, I visited with the late Dr. McColgan from 1959 to 1967 approximately three or four times each year at which time I would live with the doctor at 39 Arjay Crescent for several weeks at a time.

7. While I lived with the doctor in Toronto, I devoted myself completely to his comfort, well-being and needs and managed his home by supervising the housekeeper, day workers and repairmen, including the hiring and firing of such workers, attended to marketing and nursed the doctor and cooked his meals for him.

8. In 1965, the late Dr. McColgan insisted that I come to Ontario to stay with him permanently as he was alone and very sick and he had been informed that he had cancer.

9. My state of health at that time would not permit me to leave Sagamore, Pennsylvania for any protracted period in excess of two or three months and I was unable to accede to the doctor's request to come to Ontario to live with him permanently.

10. Throughout the period that I kept company with the late Dr. McColgan, he was at all times aware of my financial position and my state of health.

E) CONDITIONS AND UNCERTAINTY

This section and the next consider why the courts will intervene and declare a condition to be void. Broadly speaking one can delineate two reasons why courts will strike down conditions the condition is either uncertain, or it is contrary to public policy. In addition to considering the formal rules on these criteria, you should read the cases bearing in mind that conditional estates provide an excellent illustration of the relationship between property and power. If the law were to allow grantors to impose any conditions they wished, that would have the effect of increasing the number of strands in every land owner's bundle of rights. But that would also give those land owners substantial power over subsequent land owners (successors-in-title). See here the testator's desire to limit his daughter's choice of marriage partner in Clayton v. Ramsden. Moreover, it is also the case that a legal regime which did not restrict the content of conditions would permit private power to advance ends that are unacceptable if pursued in the public sphere: Re Noble and Wolf and Re Canada Trust and Ontario Human Rights Commission both raise this problem.

The next two cases deal with uncertainty. Consider what degree of "uncertainty" appears to be required, and why?

SIFTON v. SIFTON, [1938] 3 All E.R. 435 (P.C. - Ont.)

LORD ROMER: This is an appeal from a judgment of the Court of Appeal for the province of Ontario, which varied a judgment of Middleton, J.A., given upon an application by way of originating motion brought by the respondents, Clifford Sifton and Wilfred Victor Sifton, the surviving trustees of the will of Clifford Winfield Burrows Sifton, deceased. By the motion the trustees sought the opinion, advice and direction of the court on certain questions arising in the administration of that testator's estate. The testator died on June 13, 1928, leaving him surviving his widow, the respondent Mabel Gable Sifton, and his daughter and only child, the appellant, who was then of the age of 13 years. The will (dated July 12, 1926), after bequeathing the testator's furniture and effects to the appellant, continued as follows:

I give devise and bequeath all other property real and personal to my executors upon the following trusts namely to manage the corpus of the estate in accordance with their best judgment continuing any investments that exist at the time of my death if they see fit and to pay to or for my said daughter a sum sufficient in their judgment to maintain her suitably until she is 40 years of age after which the whole income of the estate shall be paid to her annually.

The will then proceeded as follows:

The payments to my said daughter shall be made only so long as she shall continue to reside in Canada.

The principal question arising upon this appeal is whether this last mentioned direction is not void for uncertainty ....The testator is stated in the evidence to have been "domiciled" in England during the years 1915 to 1925, but to have returned to Canada in the last mentioned year with his daughter, and to have taken up his residence (presumably with her) at Assiniboine Lodge in the county of Leeds, Ontario, where he continued to reside, except for temporary absences on business or pleasure until his death in 1928. After the death of her father, the appellant appears to have remained in Canada continuously until Oct., 1934, during the latter part of which period she was taking a course in modern languages at the University of Toronto. This course provided an option to take the third year thereof by travelling abroad, and the appellant accordingly spent the period between Oct. 1934, and Sept. 1935, in European countries, traveling and studying for the purpose of completing her education. Thereafter she returned to Canada, where she has remained down to the present time. Since June, 1936, she has maintained in the city of Montreal an apartment of her own, which she has taken on lease and fully furnished. In Feb. 1937, however, she was desirous

My Lords, this is sufficient to dispose of the appeal. If one of the two qualifications required in a permissible husband is expressed in so uncertain terms that it is impossible to say of any particular individual whether he does or does not possess it, the whole condition is void, for it is a composite qualification that is required, and, if it cannot be said of an individual that he possesses part of the composite qualification, it is obvious that he cannot be said to possess the whole. It is impossible, merely because the condition as to Jewish parentage fails for uncertainty, to split up the forfeiture clause in such a way as to permit, for example, marriage with a husband whose ancestors have been Christian for many generations but who on the eve of the marriage has embraced the Jewish faith in the fullest sense of those words. Such a thing would be quite contrary to the testator's intention. His intention cannot be given effect to because he has not chosen to express -it in sufficiently unambiguous terms, but that does not justify the court in making a new will for him and treating him as if he had expressed a different intention altogether.

Even if the clause could be read as though it merely provided for a forfeiture in the event of the daughter being married to a man not of the Jewish faith, I am of opinion that it would still be void for uncertainty. For how is it to be ascertained whether a man is of the Jewish faith? The Court of Appeal answered this question by saying that whether a man was or was not of the Jewish faith was a mere question of fact to be determined on evidence, and that the assertion by the man that he was of that faith was well nigh conclusive. I should agree entirely with the Court of Appeal as to this if only I knew what was the meaning of the words "of the Jewish faith." Until I know that I do not know to what the evidence is to be directed. There are, of course, an enormous number of people who accept every tenet of, and observe every rule of practice and conduct prescribed by, the Jewish religion. As to them there can be no doubt that they are of the Jewish faith, but there must obviously be others who do not accept all those tenets and are lax in the observance of some of those rules of practice and of conduct, and the extent to which the tenets are accepted and the rules are observed will vary in different individuals. I do not doubt that each of these last mentioned individuals, if questioned, would say, and say in all honesty, that he was of the Jewish faith. On the other hand, I do not doubt that one who accepted all the tenets and observed all the rules would assert that some of the individuals I have mentioned were certainly not of the Jewish faith. It would surely depend on the extent to which the particular individual accepted the tenets and observed the rules. I cannot avoid the conclusion that the question whether a man is of the Jewish faith is a question of degree. The testator has, however, failed to give any indication what degree of faith in the daughter's husband will avoid, and what degree will bring about, a forfeiture of her interest in his estate. In these circumstances the condition requiring that a husband shall be of the Jewish faith would, even if standing alone, be void for uncertainty. I would allow this appeal.

NOTES

1) In Re Down (1968), 2 O.R. 16 (C.A.) the testator's will provided in part:

When my said son, Harold Russell Down, arrives at the age of thirty years, providing he stays on the farm, then I give, devise and bequeath all of my estate both real and personal of every nature and kind whatsoever and wherever situate unto my said sons Stanley Linton Down and Harold Russell Down to be divided between them equally share and share alike.

Harold Down, 26 years old and not farming, applied for construction of the will in order to ascertain his rights to his father's estate. The trial judge held that the will created a condition precedent not void for uncertainty. Harold Down appealed, arguing that he had a contingent interest which would vest when he reached 30, attached to which was a condition subsequent which was void for uncertainty.

Do you think the appeal should succeed?

2) In Blathwayt v. Lord Cawley and Others, [1975] 3 All E.R. 625 (H.L.) the court considered the validity of a condition which prohibited future heirs of the testator (maker of a will) from inheriting, or divested the estate once inherited, if any of them should "Be or become a Roman Catholic". Following Clayton v. Ramsden, is this uncertain?

3) The following story appeared in the Wall Street Journal, 25 August 2000: When Bernard Manger died in 1995, he left behind a will that disinherited two of his four children from his $48 million estate. The reason: They had married people who weren't born Jewish. He counted on his nephew to secure his wishes. His nephew is Sen. Joseph Lieberman, the vice-presidential candidate. "He was like an older brother to me", says Mr Lieberman, ... Nevertheless, he adds, "I was shocked by the will and in a certain sense embarrassed by it".

The Manger will is an intriguing family tale, but also something more. It thrust Mr Lieberman into a family role that is in many ways a metaphor for the role he now plays on a national stage: as a conciliator trying to bridge the world of Orthodox Jews and the more secular society of millennial America. Ben Manger was a self-made man who parlayed a trade-school education and stint working on airplane wiring in the Army into a small business started in his mother's garage. Over the years his company, Manger Electric Co, became an international supplier of high-tech wiring, and Mr Manger, who lived in Stamford, Conn., amassed a fortune through frugality and hard work. Mr Lieberman lived with his parents in his grandmother's home in Stamford as a young boy, for years bunking in the same room with his "Uncle Bennie", his senior by 22 years. The two men remained close, and ion the early 1990s, Mr Manger informed the senator that he had named him executor of his estate.

During his lifetime Mr Manger gave away large sums, sometimes anonymously.... Mr Manger was a strict but devoted and caring father, relatives say, though at times the relationship with some of his children could be stormy.... As he grew older, Mr manger became more and more concerned that intermarriage was threatening the existence of the Jewish people. And he worried that his own family was contributing to the diminution because his eldest daughter and son married people who weren't born Jewish. Both spouses converted to Judaism, though not in the Orthodox fashion Mr Manger would have liked.... In 1976 he disinherited his daughter Joyce Maskart, now 50 years old. Three years later, he cut out his son Marc Manger, now 46. When he rewrote his will in 1994, he made his intentions as clear as they could be: "I deliberately and intentionally bequeath and devise nothing [to the two] since they have already departed from the Jewish religion", he stated.... Mr Manger's two other children, twins Stephen and Renee, now 41 years old, were to receive $50,000 a year for life, adjusted for inflation - so long as neither married outside the faith and each lived "as a Jew"....

Two surprises awaited Mr Lieberman, the executor: His uncle had amassed a $48.2 million estate - far more than anyone had figured - and his two beloved cousins weren't legally entitled to any of it. "I was upset about it and troubled about it, and I felt badly for my cousins", Mr Lieberman recalls. "These were my cousins and I love them".... The will requires Mr Lieberman to play a rather intrusive role in the lives of his cousins' families. Mr Manger pledged to pay his

grandchildren's college tuition - so long as they attended Sabbath services twice a month and joined a campus-based Jewish organization. He also required his beneficiaries to either have jobs or care for their young children. He authorized Mr Lieberman "to incur all reasonable expense and to hire all services and persons" needed to enforce the will. But the senator says, "We're not going to hire inspectors; we're family"....

The senator quickly moved to try to modify the will's harshest provisions, interpreting his own appointment as trustee and executor as a signal from the grave. "He knew who he was making the executor", Mr Lieberman says. "He knew that these were my cousins and that I love them, and that by my nature I'm not as hard as the will was. He knew what I would do". Mr Lieberman was aided in his search for guidance by what he now calls a "miraculous expression of what my uncle wanted". Going through the father's effects shortly after the accident, the disinherited son, Marc, found an unsigned draft of a more recent will in his father's briefcase. According to Mr Lieberman, that document offered to reinstate the two children, as long as their spouses converted to Judaism according to orthodox rites, and the children now are beneficiaries....

Though humanely motivated and approved by a probate court, the senator's actions raise a question: Did he have the right to overturn the wishes of a dead man who had trusted him to carry out his will? Estate lawyers talk of what they call the "dead hand of the grave theory" - the idea that the deceased shouldn't be able to unduly tie up the lives of those they have left behind. "The more unusual and restrictive a will becomes, the more doctrinaire it is, the greater the chance it will be disputed" in court, says Robert Shapiro, head of trusts and estates at Ropes and Gray the Boston law firm that specializes in managing estates of the wealthy. Mr Lieberman says simply: "I felt what I was doing was right; I was carrying out his intentions".

F) CONDITIONS AND PUBLIC POLICY

The next two cases deal with the meaning of "contrary to public policy". This is a difficult notion to define. It includes conditions contrary to law - which means both conditions mandating an illegal act and conditions which seek to subvert the course of law. An example of the latter is a condition providing for divestment if the grantee becomes a bankrupt. The bankruptcy law of the jurisdiction, not the grantor, provides for the disposition of property on bankruptcy: see Re Machu (1882), 21 Ch. D. 838.

Beyond this category, it is difficult to say why the content of certain kinds of conditions attracts judicial disapprobation as contrary to "public policy" and others do not. The best one can do is to describe categories and ascribe the choices traditionally made to the values of the English judiciary. Looking at the cases as a whole, most conditions traditionally held to be invalid as against public policy were considered so because they represented restraints on marriage, conditions encouraging divorce or separation, conditions affecting parental duties, or restraints on alienation. We will not discuss the first three categories any further, and the latter is dealt with at the end of this chapter.

The issue of concern here is the relationship between private property, public policy, and what we now call unacceptable discrimination. As you will have gathered from Clayton v. Ramsden, "discrimination" has not traditionally been a reason for voiding conditions. The racial and religious distinctions made in the will in that case attracted little comment. Re Noble and Wolf deals explicitly with the validity of discriminatory terms - consider in particular the line drawn by the court between private choice and public policy and the concern expressed, especially by Hogg J. A., about not inventing new grounds of public policy. Consider also, by way of contrast, how both concerns are dealt with by the court in the much more recent Re Canada Trust case.

You should note that neither of these two cases involves a conditional fee. Noble and Wolf is about a restrictive covenant, a topic we will cover in a later chapter. Re Canada Trust is about a charitable foundation and personal property. Do not concern yourselves with these distinctions; the purpose of the cases is to consider what should be the scope of "public policy".

NOTES

1) Following the Court of Appeal's decision in Re Noble and Wolf the Ontario legislature amended the Conveyancing and Law of Property Act by adding the following section [now s:22]

"Every covenant made after the 24th day of March, 1950, that but for this section would be annexed to and run with land and that restricts the sale, ownership, occupation or use of land because of the race, creed, colour, nationality, ancestry or place or origin of any person is void and of no effect. "

Consider precisely how this would affect the covenant in Re Noble and Wolf?

2) An appeal of the Ontario Court of Appeal decision was allowed by the Supreme Court of Canada, but principally on the ground that the covenant did not satisfy the requirements of an enforceable restrictive covenant: see Noble v. Alley, [1951] S.C.R. 64. (Note that we will deal with restrictive covenants lafer in the course). Four of the seven judges also stated, as an alternative ground of invalidity, that the covenant was uncertain.

3) For a full discussion of this case and its context, see J. Walker, "Race". Rights and the Law in the Supreme Court of Canada: Historical Case Studies (Toronto: Osgoode Society for Canadian Legal History 1997), chapter four

NOTES

1) A number of Canadian cases have dealt with conditions and public policy. Consider whether the following would have been decided differently had the courts had the reasoning of the Ontario Court of Appeal in Re Canada Trust and Ontario Human Rights Commission before them?

a) In Re Rattray (1973), 38 D.L.R. (3d) 321 (Ont. H.C.), affd. (1974), 44 D.L.R. (3d) 533 (C.A.) approximately $13M was left to Queen's University to provide scholarships or bursaries. One of the conditions was that they should not be awarded "to any student who is a communist, socialist or a fellow traveller". On an application by the University the condition was struck down for uncertainty. The case generated some publicity and a letter writer to the Globe and Mail, 17 September 1973, said in part: "The university ... had no qualms about accepting the money on this basis. Now that ... Rattray is ... dead they apparently find it morally proper to alter his conditions, without the acceptance of which the money would not have been given to them in the first place .....[H]is money will henceforth be made available to persons whose political philosophy he deplored, even though he took pains to develop the point that it should not. I believe this court's decision should be appealed, not only to safeguard the intents of the deceased person who has given so generously, but to safeguard the inviolability of trust funds in general and the intents that gave them birth".

On the issue of uncertainty, the letter writer agreed that there "is ... no precise definition" of terms like socialist, communist, or fellow traveller. But the problem could be dealt with by asking each student who applied to the fund: "can you in conscience subscribe to its intent in accepting this scholarship"?

b) In Re Hurshman (1956), 6 D.L.R. (2d) 615 (B.C.S.C.) the testator left property which his daughter would inherit "provided she is not at that time [the time when the will took effect] the wife of a Jew". This will was made a month after Mr. Hurshman's daughter married Ivan Mindlin, who all parties to the case agreed was by "lay definition" Jewish. McInnes J. held that the condition "is directly contrary to public policy" because "in order for the daughter to inherit she must divest herself of her husband".

c) Re Metcalfe (1972), 29 D.L.R. (3d) 60 (Ont. H.C.) involved a testator who provided for a scholarship fund in his will. McGill was to provide a scholarship for a male medical student unable to finance his own studies, who was a Protestant of good moral character, had received a high school education in Ontario, and had shown athletic ability. When the university was informed of this it disclaimed the gift, stating in a letter that "our Scholarship Committee ... will not recommend acceptance of discriminatory gifts such as this for ' a Protestant of good moral character, educated in Ontario and who possesses athletic ability' "

Any recipient of property is entitled to disclaim, and that might have been the end of the matter. However, the testator's widow argued that the gift should stand as one given to charity, that

McGill was only the selector of the recipient, not the recipient itself, and that the court should appoint another "selector". After construing the precise terms of the bequest the court held that McGill was really the recipient, and that the gift therefore failed.

2) The relationship between the right of an owner to do what he or she wants with property and anti-discrimination law was addressed directly in L'association A.D.G.O. v. Catholic School Commission of Montreal (1979), 112 D.L.R. (3d) 230 (Que S. C.). The Commission offered to the public generally weekend rentals of its buildings. But it refused to rent them for a weekend conference to L'Association A.D.G.Q. because, in the words of Beauregard J., "petitioner is an organization that has as its principal object the organizing of homosexual men and women in order to defend their interests" and "respondent submits that homosexuality is a practice which is condemned by the highest authorities of the Catholic Church, and that consequently the exclusion of petitioner as a lessee is justified by the religious or educational character of respondent, a non profit institution." The court considered three provisions of Quebec's Charter of Human Rights and Freedoms:

Section 6: Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.

Section 10: Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction exclusion or preference based on race, colour, sexual orientation, sex, civil status, religion, political convictions, language, ethnic or national origin or social condition. Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

Section 12: No one may, through discrimination, refuse to make a juridical act concerning goods or services ordinarily offered to the public.

From these provisions the court concluded that "whatever may be the justification of respondent's decision on other than legal grounds, the refusal contravenes s. 12 of the Charter of Human Rights and Freedoms." The Commission, however, argued that its action was saved by section 20 of the Charter, which reads: "A distinction, exclusion or preference based on the aptitudes or qualifications required in good faith for a job, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory."

Beauregard J. dealt with this argument as follows:

"While I accept that, as a question of fact, homosexuality is a practice which is condemned by the highest authorities of the Catholic Church, and that respondent is a non-profit institution which has as its object to provide Catholic education, I am of the opinion that, within the confines of the present case, respondent has not succeeded in showing that it should benefit from the exception provided by s. 20 of the Charter. One may certainly imagine cases where respondent might invoke s. 20 of the Charter and refuse to contract with another person by alleging an exclusion justified by its religious or educational character. There is no point, however, in evoking these cases here .... Interpreted strictly, s. 20 does not say that s. 10 does not apply to nonprofit institutions which have an educational or religious character, but it does say that an exclusion invoked by a non-profit institution must be "justified" by the religious or educational character of that institution.

If there exist effectively in a given situation certain facts which would make such an exclusion, in the eyes of the directors of a nonprofit institution acting in good faith, a logical and rational consequence of its religious or educational character, it is not for the Courts to put themselves in their place and exercise the discretion which is theirs. But in the complete absence of a rational connection between the religious or educational character of an institution and a discriminatory practice, it falls to the Courts to intervene in order to sanction such practices.

In the present case, respondent has decided to offer to the general public the rental of its buildings. Respondent has even granted leases to non-Catholic churches and atheist or agnostic political parties. On the fringes of this more or less commercial practice I see no connection between respondent's religious or educational character and its decision to exclude the petitioner association as a lessee on account of the ideas which this group advances .... [T]he real problem is this: respondent refuses to rent to petitioner because it apprehends the deleterious effect which the rental of a building to a homosexual association would have on its Catholic students, it being accepted that homosexuality is a practice condemned by the Catholic Church. It is thus an apprehension which is perhaps justified but not permissible with respect to ss. 12 and 10 of the Charter of Human Rights and Freedoms.

3) In Fox v. Fox Estate (1995), 10 E.T.R. (2d) 229 (Ont. C.A.) a testator left his widow and executor, Miriam, a life interest in 75 per cent of his estate, with a power to use the capital for the benefit of his grandchildren. What was left of the estate after the widow's death was to go to the testator's son Walter. Walter had two children by his first marriage, and in 1989 decided to marry again to a woman who was his secretary and not Jewish. The widow did not like this, and used the power of encroachment to give her grandchildren all the residue of the estate. The Court of Appeal disallowed her actions, and the case is largely concerned with the law relating to the discharge of their duties by executors and trustees. But one of the three judges, Galligan J.A., accepted the trial judge's finding that the widow was motivated by dislike of Walter's choice of marriage partner, specifically the fact that she was not Jewish. He stated, inter alia: "It is abhorrent to contemporary community standards that disapproval of a marriage outside of one's religious faith could justify the exercise of a trustee's discretion. It is now settled that it is against public policy to discriminate on grounds of race or religion". As authority for this he cited the Canada Trust case. He then stated: "If a settlor cannot dispose of property in a fashion which discriminates upon racial or religious grounds, it seems to me to follow that public policy also prohibits a trustee from exercising her discretion for racial or religious reasons". Galligan J. A. acknowledged that while there were past decisions which "upheld discriminatory conditions in wills", counsel in the present appeal had not been prepared to argue that these were still correct, that "any court would today uphold a condition in a will which provides that a beneficiary is to be disinherited if he or she marries outside of a particular religious faith".

Do you think this is a correct reading of the Canada Trust decision? Do you think this ought to be the law?

4) Two recent charities cases have referred to the Re Canada Trust decision. In Re Ramsden Estate (1996), 139 D.L.R. (4th) 746 (P.E.I.S.C.-T.D.) at issue was a bequest to the University of Prince Edward Island to create bursaries or scholarships to be awarded "to protestant students". Beyond this preference, nothing else was stated as to why the testatrix had chosen as she did. The court first found that this could not be given effect to because the University Act, R.S.P.E.I. 1988, c. U-4 prohibited the University from administering any such funds, on the grounds that they

required the imposition of a "religious test". However, it went on to find that the fund could be administered by some other body and thus achieve the same purposes. That brought into play the question of whether the trust established by the bequest was generally contrary to public policy, and the court held that it was not, in the process not even referring to the apparent "public policy" of non-denominational University scholarships. With reference to the Leonard Foundation case, the court said: "that case is distinguishable from the present one, in that the trust in that case was based on blatant religious supremacy and racism. There is no such basis for the trust in this case". Thus "motive" seemed to play a large role.

In a more recent case, University of Victoria v. The Queen (2000), 185 D.L.R. (4th) 182 (B.C.S.C.), a woman had left the University money to establish two bursaries, one for "a practicing Roman Catholic student" in education and the other in music for "a Roman Catholic student". The court dealt with two issues. First, it decided that the terms did not violate the Human Rights Code of the province because the trust fund did not constitute a "public" relationship between the University and the public. Here the University was simply the trustee appointed under the will of a private citizen to give effect to a private bequest. Second, it held that the terms did not violate public policy. That doctrine should be invoked "only in clear cases", and "the terms of the scholarship in Re Leonard are clearly offensive and distinguishable from those before me". The court had "no hesitation in concluding that a scholarship or bursary that simply restricts the class of recipients to members of a particular religious faith does not offend public policy". It is unclear whether the distinction drawn by the court between this case and Canada Trust was motive, or the fact that religion only was involved, or both.

4) The following is the December 1995 practice exam. Ignoring clause 2 of the will and any questions relating to the Island, how would you advise David?

Alice Bell, who died in 1990, was a wealthy widow living in Toronto. Among other property, she owned a Forest Hills house and an island (Bell's Island) in cottage country. She had two sons, Christopher and David, both of whom are still alive. Christopher is married to Erica, has two children, and is a successful newspaper columnist well-known for his vivid advocacy of "family values" and right-wing economic views in the Toronto Moon. David is gay and a legal-aid lawyer, neither of which facts endeared him to his family. The provisions of Alice Bell's will dealing with her real property read as follows:

1) I leave my house on Dunvegan Road, Toronto, to my son David, who cannot afford to buy his own house, although if he ever shares it with a gay lover he loses all his rights in it and it will go to my son Christopher ....

2) I leave Bell's Island to my sons Christopher and David, as joint tenants and not as tenants in common.

David did not like clause 1 of the will, but was pleased enough to have a nice house to live in and moved in shortly after his mother's death. From 1992 he and Frank began a permanent relationship. Mindful of the clause in the will, David did not let Frank move in although he spent almost every weekend in the Dunvegan Road house. In the summers David and Frank spent as much time as they could on Bell's Island, sharing the large cottage with Christopher and his family. About two years ago, however, the uneasy relations between the brothers became strained to the point that they stopped speaking to each other. Through Erica they agreed that Christopher would pay for the construction of a small cottage and dock on the island as far away from the main one as possible. This he gave to David, with David thereafter paying for the taxes and services for the second cottage. Once this was done, and without any discussion of the matter, they kept to different sides of the island and never saw each other. Although David liked Christopher's children and wanted to see them, their father told them not to go over to David's "side".

In September of this year Christopher was killed in a car accident, likely attributable to the cancellation of photo radar. David, who remembers fondly his property law course in law school, believed that as a result he owned Bell's Island outright. Last week, however, he received a letter from a lawyer acting for Erica which stated that she claimed a half-interest as Christopher's heir. David has consulted you for an opinion on this point. During the interview he also complained about not being able to co-habit with Frank. After reviewing the will you told him that the prohibition relating to the Dunvegan Road house might. not be enforceable, which pleased him greatly. Indeed he wants you to devote a little more of your time to that question than to the question of ownership of the island. Please advise David, ignoring the fact that Christopher's heir is his wife.

INTRODUCTION TO RESTRAINTS ON ALIENATION

The final case here deals with a particular type of condition contrary to public policy - a restraint on alienation, a condition that limits the ability of the grantee to alienate the land. This is a rather complex area, and we will only look at one part of it. As necessary background, however, something should be said about the typical traditional restraint on alienation case. This would be an interest in land given in a will, attached to which would be a condition that if the land is sold to certain persons, or used for a certain purpose, or not first offered to certain persons, then the estate ends. This is sometimes called a "forfeiture restraint" - the estate is forfeit if the condition is broken. There is a long line of cases to the effect that if such a restraint is substantial (which you can take to mean that it would substantially affect the selling price) then it will be voided. A recent example is an attempt to prevent the grantee from conveying to anyone but the grantee's son: Thibodeau v. Thibodeau (1989), 100 N.B.R. (2d) 156 (Q.B.).

It is often said that restraints on alienation are invalid because they are repugnant to the fee simple. That is, the right to freely alienate is a crucial part of the fee simple and you cannot limit it. This is a circular argument, -for there is nothing inherent in the fee simple which requires a full power to alienate. The argument is not only circular, it is also wrong, for two reasons. First, socalled "partial" restraints on alienation are permitted. Using the example just given, had the condition been that the grantee could sell to anyone but the son, it would have been considered only partial. But if some notion of repugnancy is really at the root of judicial policy here, a condition eliminating just one possible purchaser is as repugnant as one eliminating all purchasers. As in so many other areas, the difference is one of degree, not principle.

The second reason why the repugnancy argument does not hold water is that very substantial (but not total) restraints survive court scrutiny if they have been bargained for. The leading case is Stephens v. Gulf Oil Canada Ltd (1975), 65 D.L.R. (3d) 193 (Ont. C.A.). A three-party agreement for sale of lands contained a clause that if two of the parties wanted to sell they had to offer the properties first to each other, at agreed prices. The agreement stated that if the offeree did not take up this right, the property could be sold to anybody at any price. The requirement to first offer the land to another at a fixed price was challenged as a restraint on alienation. The Court first considered whether this was a condition imposed on the grantee as a necessary pre-requisite to get title, or a contractual provision agreed to by the parties. It was held to be the latter, and thus valid. That is, it is possible to agree to a substantial restraint. Here freedom of contract prevails over "repugnancy". Had the pre-emptive right been a condition imposed, then it would have been void, because the parties would not be able to sell the property at market value.

Laurin deals with circumstances not dissimilar to Stephens, yet the court comes to a different conclusion. Try to assess how and why it does so, both as a matter of doctrine and as a matter of policy.

CHAPTER FIVE

CONCURRENT OWNERSHIP

(A) INTRODUCTION

We have seen that the common law permits "shared" ownership where ownership is divided by time - for example, the life tenancy and the reversion in fee simple. It also permits two or more persons to own property and to have simultaneous rights in it. When this happens they are said to hold jointly, to be co-owners, or to have concurrent interests in the property. Any estate known to the law, and all types of property, can be the subject of co-ownership.

To complicate matters, there is more than one form of co-ownership. Historically there were four, but only two now concern us. Cheshire, Modern Law of Real Property, gives us the following explanation:

> There are four possible forms of co-ownership, one of which, tenancy by entireties, is now defunct; while another, coparcenary, seldom arises. The two found in practice are joint tenancy and tenancy in common....
>
> The two essential attributes of joint tenancy which must be kept in mind ... are the absolute unity which exists between joint tenants, and the right of survivorship.
>
> There is, to use the language of Blackstone, a thorough and intimate union between joint tenants. Together they form one person. This unity is fourfold, consisting of unity of title, time, interest and possession. All the titles are derived from the same grant and become vested at the same time; all the interests are identical in size; and there is unity of possession, since each tenant totum tenet et nihil tenet. Each holds the whole in the sense that in conjunction with his co-tenants he is entitled to present possession and enjoyment of the whole; yet he holds nothing in the sense that he is not entitled to the exclusive possession of any individual part of the whole. Unity of possession is a feature of all forms of co-ownership.
>
> For this reason one joint tenant cannot, as a general rule, maintain an action of trespass against the other or others, but can do so only if the act complained of amounts either to an actual ouster, or to a destruction of the subject matter of the tenancy.
>
> The other characteristic that distinguishes a joint tenancy is the right of survivorship, or jus accrescendi, by which, if one joint tenant dies without having obtained a separate share in his lifetime, his interest is extinguished and accrues to the surviving tenants whose interests are correspondingly enlarged. For example, A and B may be joint tenants in fee simple, but the result of the death of B is that his interest totally disappears and A becomes owner in severalty of the land.
>
> There are cases, however, where the right of survivorship does not benefit both tenants equally, for if there is (say) a grant to A and B during the life of A, and A dies first, there is nothing that can accrue to B.
>
> There is a fundamental distinction between tenancy in common and joint tenancy. In the first place, that intimate union which exists between joint tenants does not necessarily exist in a tenancy in common. In the latter case the one point in which the tenants are united is the right to possession. They all occupy promiscuously, and if there are two

tenants in common, A and B, A has an equal right with B to the possession of the whole land. But their union may stop at that point, for they may each hold different interests, as where one has a fee simple, the other a life interest; and they may each hold under different titles, as for instance where one has bought and the other has succeeded to his share. Each has a share in the ordinary meaning of that word. His share is undivided in the sense that its boundary is not yet demarcated, but nevertheless his right to a definite share exists.

The second characteristic, and it is really the complement of the first, is that the jus accrescendi has no application to tenancies in common, so that, when one tenant dies, his share passes to his personal representatives, and not to the surviving tenant: "A tenancy in common, though it is an ownership only of an undivided share, is, for all practical purposes, a sole and several tenancy or ownership; and each tenant in common stands, towards his own undivided share, in the same relation that, if he were sole owner of the whole, he would bear towards the whole."

(B) JOINT TENANCY OR TENANCY IN COMMON?

Given the consequences of the distinction between joint tenancy and tenancy in common - principally, the right of survivorship - it is obviously important that we know in each case which of the two co-ownership regimes is in force. Sometimes this is easy. For example, if a will states that land is given "to A and B as joint tenants in fee simple" then A and B hold as joint tenants. The four unities are present and the testator or testatrix has clearly indicated a desire to establish a joint tenancy. But it is not always so simple. Remove the words "as joint tenants" from the above provision and, while the four unities are still present and while the testator or testatrix clearly wishes A and B to be co-owners, we cannot say from the words alone whether that co-ownership is as joint tenants or as tenants in common. What we need here are presumptions to deal with unclear cases. Unfortunately, courts of common law and courts of equity operated with different presumptions, and statutory reform has partially amended the common law rules.

At this stage we therefore need to embark on a small diversion into equity. The following extract from the first edition of Ziff, Principles of Property Law, provides a brief introduction to the meaning of "equity" and how it relates to the common law. Although the most important aspect of equity - the trust - is the subject of a separate course, it is necessary to have some understanding of equity both for this chapter and for the one below on covenants running with land. The first section on "The Origins of Equity" details the historical development of equity, both in the area of doctrine and as a separate set of institutions. The second section on the use and the trust is the more important for our purposes, for it describes, albeit briefly, how the notion of a separate equitable title came into the law. This section misses out the story of how the "use" developed into the modern "trust", but that is not important for current purposes. While there were significant differences between uses and trusts, concentrate on understanding the concept common to both - the holding of property by one person at common law for the benefit of another in equity.

Common Law, Equitable, and Statutory Rules on Presumptions

With an understanding of equity, we can return to the issue of presumptions. The rules here may be stated as follows:

1) At common law, provided the four unities were present, grants and testamentary dispositions of all property, real and personal, made to co-owners, were presumed to be joint tenancies if the words of the transfer were equivocal. Thus a simple phrase like "to A and B" created a joint tenancy. The common law would construe a disposition as a tenancy in common only if the deed contained words ("words of severance") which clearly implied equality of division, such as 'between A and B' or 'to A and B equally'. The common law took this position because survivorship lessened the number of names on the title and thereby made conveyancing easier.

2) Equity preferred the opposite presumption to the common law. That is, it preferred tenancies in common to joint tenancies because they were fairer and did not contemplate an owner, or rather an owner's heirs, losing all rights through survivorship. However, the general principle that "equity follows the law" meant that equity could not presume a tenancy in common in all circumstances, for that would have meant that equity would have "overwhelmed" the law. It therefore accepted the common law presumption where the joint tenancy was clearly stated.

However, it would try to find "words of severance" in a grant or will when it could. As it is put in Cheshire, Modern Law of Real Property, equity found a tenancy in common if there were "words of severance showing an intention, even in the slightest degree, that the donees are to take separate shares.... The following expressions have at one time and another been construed as words of severance sufficient to create a tenancy in common: equally to be divided, to be divided, in equal moieties, equally, amongst, share and share alike. So also, if land is devised to A and B on condition that they pay in equal shares ten shillings a week to X during his life, this imposition of an equal burden on both donees shows that what would normally be a joint tenancy is to be a tenancy in common".

In addition, in some circumstances equity refused to follow the law and presumed a tenancy in common in equity even if the four unities were present and the intention to create a joint tenancy was clear. There were three circumstances where, per Cheshire again, "equity reads what is at law a joint tenancy as a tenancy in common". They were: (a) where money is advanced on a mortgage, whether in equal or unequal shares; (b) where the purchase price is provided in unequal shares; and (c) where the property belongs to a business partnership.

3) The rules enunciated above remain the common law and equitable approaches to personal property. However, statutory reform has altered the rules for real property. It is now presumed that a tenancy in common has been created unless the instrument clearly states otherwise. Section 13 of the Conveyancing and Law of Property Act, R.S.O. 1990, c. C-34, states:

13 (1) Where by any letters patent, assurance or will, made and executed after the 1st day of July, 1834, land has been or is granted, conveyed or devised to two or more persons, other than executors or trustees, in fee simple or for any less estate, it shall be considered that such persons took or take as tenants in common and not as joint tenants, unless an intention sufficiently appears on the face of the letters patent, assurance or will, that they are to take as joint tenants.

(2) This section applies notwithstanding that one of such persons is the spouse of another of them.

Thus to create a joint tenancy in land you now need to say "to A and B as joint tenants and not as tenants in common". Obviously if this is done, if an "intention to the contrary" is clearly indicated, the joint tenancy must stand; equity cannot overrule the statute.

Putting all these rules together, we can conclude that if A and B acquire real property, they do so as tenants in common, unless there are clear words to the contrary. Such a clear contrary intention would prevail over the equitable rules, because equity, like common law, must give way to a statutory rule.

If A and B acquire personal property, the common law presumes that the legal title is held as a joint tenancy, unless it is clearly stated otherwise. But if, for example, the property is then used by A and B in a business partnership, equity presumes that the equitable title is held as a tenancy in common. In this situation the personal property would be held by two or more persons as legal (a term used to mean common law as opposed to equitable) joint tenants and as trustees for each other as equitable tenants in common.

We will see the operation of the equitable preference for tenancies in common again, in the section below on severance of joint tenancies.

Note two other statutory provisions. Section 14 of the Conveyancing and Law of Property Act, R.S.O. 1990, c. C-34, provides:

14. Where two or more persons acquire land by length of possession, they shall be considered to hold as tenants in common and not as joint tenants.

Section 55 of the Succession Law Reform Act, R.S.O. 1990, c. S-26, provides:

55 (1) Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, the property of each person, or any property of which he or she is competent to dispose, shall be disposed of as if he or she had survived the other or others.

(2) Unless a contrary intention appears, where two or more persons hold legal or equitable title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person shall be deemed, for the purposes of subsection (1), to have held as tenant in common with the other or with each of the others in that property.

(C) SEVERANCE OF JOINT TENANCIES

Severance is the process by which a joint tenancy is converted into a tenancy in common. The parties remain co-owners and there is no physical division of the property - that is partition, the final topic in the chapter. The principal significance of severance, therefore, is that it brings to an end the right of survivorship.

Severance of the legal title can be achieved by any act by any joint owner on his or her legal title so as to destroy one of the four unities, the indicia of a joint tenancy. Thus if A and B are joint tenants of a piece of land, and A sells her interest to C, C and B must be tenants in common because they hold their interests under different titles - the unity of title has been broken. Such legal acts include sale to oneself by a joint tenant, which is permitted by s. 41 of the Conveyancing and Law of Property Act, R.S.O. 1990, c. C-34:

> A person may convey property to or vest property in the person in like manner as the person could have conveyed the property to or vested the property in another person.

Since equity prefers tenancies in common in any event, there are no circumstances in which equity would insist on retaining a joint tenancy in equity if it was severed in law by an act such as the ones already described. But merely because no such legal act has served to sever the legal title does not mean that equity would not strive to find the equitable title severed. The principles on when this would occur were laid out in the nineteenth century case of Williams v. Hensman. The second and third ways to sever noted there sever in equity but not in law. Burgess v. Rawnsley is the leading modern English case on the application of Williams v. Hensman. You will note that statutory reform in England has abolished the common law tenancy in common, so that conveyances to two or more people must be done through a common law joint tenancy, with the only issue being whether the equitable title is held as a joint tenancy or as a tenancy in common. The reason for this is that it makes it much easier to search title. Of the Canadian jurisdictions, only Manitoba has enacted a similar reform, and then only partially.

BURGESS v. RAWNSLEY [1975] 3 All E.R. 142 (C.A.)

LORD DENNING MR. In 1966 there was a scripture rally in Trafalgar Square. A widower, Mr. Honick, went to it. He was about 63. A widow, Mrs. Rawnsley, also went. She was about 60. He went up to her and introduced himself. He was not much to look at. 'He looked like a tramp', she said. 'He had been picking up fag ends.' They got on well enough, however, to exchange addresses. His was 36 Queen's Road, Waltham Cross, Hertfordshire. Hers was 74 Downton Avenue, Streatham Hill, London, SW2. Next day he went to her house with a gift for her. It was a rose wrapped in a newspaper. Afterwards their friendship grew apace. She was sorry for him, she said. She smartened him up with better clothes. She had him to meals. She went to his house; he went to hers. They wrote to one another in terms of endearment. We were not shown the letters, but counsel described them as love letters.

A few months later Mr. Honick had the opportunity of buying the house where he lived at 36 Queen's Road, Waltham Cross. He had been the tenant of it for some years, but his wife had died and his married daughter had left;

NOTES

1) Burgess v. Rawnsley was referred to with approval in Robichaud v. Watson (1983), 42 O.R. (2d) 38 (H.C.). In that case Mr. Robichaud and Ms. Watson purchased a house as joint tenants and lived in it from 1971 to 1974. They went on a vacation to England in 1974, where Watson announced that she would not return. Robichaud returned and lived in the house alone, paying all expenses. In 1975 there were unsuccessful negotiations between their solicitors for the sale of Watson's equity. Robichaud died in 1979, and Watson argued that the joint tenancy had still existed at his death. The Court rejected this, and per the third rule in Williams v. Hensman found that the separation, the negotiations, and the fact that Robichaud alone was responsible for the house all demonstrated that the parties regarded themselves as tenants in common.

2) K and T were married in 1971 and bought a house as joint tenants. In 1987 they separated, K moving out. In 1988 K made an application under the provincial matrimonial property legislation in which she stated that there was no reasonable prospect of reconciliation between the parties and in which she asked for a division of family assets. K and T also carried out negotiations for settling their affairs; these negotiations included, but were by no means limited to, sale of the house and division of the proceeds. They were not concluded. In April 1988 T made a will leaving his estate to his new partner. In September 1988, with no agreement having been reached between him and K, T died. Who should be entitled to T's share of the house?

3) In Schobelt v. Barber (1966), 60 D.L.R. (2d) 519 (Ont. H.C.) William Barber murdered his wife Marjorie Barber, with whom he had been a joint tenant. Her sister sued to prevent William inheriting by survivorship. She argued that it was "contrary to public policy that the defendant should be able to deal with this parcel of real estate as his own because of the death of his wife at his own hand." In the words of Moorhouse, J., the defendant's argument was that while "no one shall gain a right by his own wrong, ... if he has a right he shall not lose it because of a wrong done by him in connection with it." Moorhouse J. referred to statutory and common law doctrines that prevented murderers from taking benefits under insurance policies or wills in similar circumstances, and noted that the issue of benefit by survivorship had not been resolved.

While the judge did not find it difficult to state that public policy should prevent Barber from benefitting from his act, he had more difficulty in deciding how this should be done. He did not wish to simply declare "the jus accrescendi ... inoperative" because this "would ... deprive the survivor of a right he acquired on the creation of the joint tenancy" and would "impos[e] a further penalty on the survivor who has been sentenced for the crime of which he has already been convicted." Nor did he adopt a suggestion that the murderer be deemed to have pre-deceased his victim; this "could only be accomplished by legislation" [or perhaps by God]. Moorhouse J. decided to allow the right of survivorship to operate, so that Barber was sole owner at common law, and then to "impress [the property] with a trust and declare he then holds an interest as constructive trustee for the victim's heirs or devisees." Those heirs therefore received a half interest as beneficiaries of the trust, with Barber having the other half.

(D) RELATIONS BETWEEN CO-OWNERS

Introduction

The material in this section, and in the subsequent one on partition or sale, applies equally to joint tenants as to tenants in common.

The underlying principle in the law's treatment of the relations between co-owners is that the owners should work out their problems themselves; the courts will not "police" the relationship. At common law there were only two actions that could be taken by one co-owner against another.

First, an action for waste was available if one co-owner damaged the land. The courts were, and are, more restrictive in allowing actions for waste in this area than when ordering the relations between a life tenant and the holder of the remainder interest. This is because co-tenants have equal rights of occupation and use. Injunctions against waste will be granted only where the waste is malicious, or destructive, or attended by peculiar circumstances; there is no action for waste if the land use is reasonable.

Second, if one co-owner seeks to exclude the other from the land, the action of ouster is available. This responds to the rule that no co-owner can exclude the others from possession or enjoyment of the whole or part of the land. However, mere sole possession or appropriation of the entire proceeds does not amount to an ouster, which requires denial of the co-owner's rights.

An interesting recent case on ouster is M. v. H. (1994), 17 O.R. (3d) 118 (G.D.). The parties were same-sex partners who registered their cottage as a joint tenancy. When they split up one sued for support, arguing that the provision of the Family Law Act which restricted the meaning of spouse to persons of the opposite sex violated the Charter. In interim proceedings a small side issue was use of the cottage property they owned together, the mortgage and other expenses of which were paid for by one party. The other had had no access to it since the separation, and asked for an order permitting her use and occupation. The defendant argued that as she was paying all the expenses, such an order would be "tantamount to" support. Epstein J rejected this argument. The only way one party could achieve exclusive possession was via the provisions of the Family Law Act, and to that point the Act was inapplicable. Thus the couple's interests were to be decided according to the common law, and the party in possession, in refusing to let her partner use the cottage, had "ousted" the other. The court ordered use on alternate weekends.

An action for account (an action where one party claims that another must pay him or her money) was not available at common law, but could historically be obtained in equity. It is now available by statute, but in very limited circumstances, as explained in the following cases.

(E) PARTITION OR SALE

Introduction

At common law the only way to resolve disputes between co-owners was by agreement to sell or to partition - the courts would not intervene and order a partition or sale. Partition or sale are now generally available in Canada through provincial legislation, usually in something called the Partition Act. Partition or sale terminate a co-ownership. If the land is partitioned it is physically divided between the co-owners so that each is a separate and individual owner of his or her parcel. If the land is sold off by order of the court, rather than partitioned, each co-owner receives a proportionate part of the proceeds.

The provincial legislation is more or less the same. Sections 1-3 of the Ontario Partition Act, R.S.O. 1990, c. P-4, read as follows:

1. In this Act... "land" includes lands, tenements, and hereditaments, and all estate and interests therein.

2. All joint tenants, tenants in common, and coparceners, all doweresses, and parties entitled to dower, tenants by the curtesy, mortgagees or other creditors having liens on, and all parties interested in, to or out of, any land in Ontario, may be compelled to make or suffer partition or sale of the land, or any part thereof, whether the estate is legal and equitable or equitable only.

3. (1) Any person interested in land in Ontario, or the guardian of a minor entitled to the immediate possession of an estate therein, may bring an action or make an application for the partition of such land or for the sale thereof under the directions of the court if such sale is considered by the court to be more advantageous to the parties interested.

The rest of this section deals with the fact that the statutory provisions reproduced above say "partition or sale". The Dibattista case discusses when one rather than the other will be ordered.

RE DIBATTISTA ET AL AND MENECOLA ET AL (1990), 74 D.L.R. (4th) 569 (Ont. C.A.)

The judgment of the court was delivered by BROOKE J.A.: .... The issue in this case is whether the trial judge correctly applied the sections [of the Partition Act] in ordering a sale of the lands in a dispute between a land developer who acquired the interest of one tenant in common and an investor in the land who was the other tenant in common and who refused to accept the developer's offer to purchase his interest, thus preventing the developer from accomplishing the desired land assembly.

The facts of the case ... may be briefly stated as follows. The respondent Lorenzo Menecola and his brother-in-law Leonard Ruggiero were in business together and had common investments. Together with their wives, they purchased the land as vacant land in Mississauga in 1973. Each couple took title as tenants in common. The adjacent property to the north was owned by the Mackees. In June of 1986, the Menecolas and Ruggieros agreed with the Mackees to make a joint application for the rezoning of their two properties as "mixed commercial and industrial" and to sell them as one package. The properties were rezoned on August 8, 1988. The parties received a number of offers to purchase their two properties. One of the offers was accepted by all of them, but it failed to close. In November of

(F) PROBLEM

In 1992 Maude, Naomi and Phoebe, three elderly sisters, owned a large, rambling house in the Beaches. Maude was a widow with two children, Rose and Stella, who were both in their forties and divorced. Naomi and Phoebe had never married. The three sisters had inherited the house as joint tenants some twenty years previously, and lived there together since that time.

At the end of 1992 Maude decided that she wished to transfer her interest to her daughters inter vivos. She did this via deed on December 1st, 1992, and the deed was properly registered in the appropriate office. The consideration was stated to be "$1.00 and natural love and affection", and Rose and Stella were stated to take title "as joint tenants and not as tenants in common". Maude died the following summer, and her two sisters decided that they could not look after themselves any more, and moved into a nursing home. Rose and Stella moved into the house.

Rose and Stella then decided that the property needed extensive repairs, but that in order to recoup the expense it would be wise to revamp the place for use as a small private hotel. The house was worth about $600,000, and through the rest of the summer of 1993 they put some $200,000 of their own money into it, in equal shares. Their aunts made no contribution to these renovations or to the subsequent operating expenses, and indeed were only vaguely aware of what was going on. The hotel enterprise, begun in September 1993 pursuant to a formal partnership agreement between Rose and Stella, turned out to be reasonably successful.

This year a number of things happened. First, Rose and Stella decided they would like to add on to the property but would need to borrow money and the bank wanted them to buy out their aunts' share of the property. Discussions about this took place between the parties, and while Naomi and Phoebe were willing to sell, they wanted more for their shares than Rose and Stella offered. The property was appraised at $1 million, and the aunts demanded some $666,000. That is, they did not want to make an allowance for the monies spent on improvements by their nieces.

Second, Naomi recently received a letter from her daughter Theresa, who she had given up for adoption rather than face life as a single parent in a disapproving age. Theresa had traced her biological mother after a long and difficult search. Naomi decided she would like to transfer her interest to Theresa just in case she should predecease her sister. She wrote Theresa a letter stating her intention to do so, and consulted a lawyer with a view to carrying out this intent. A deed was drawn up, but Naomi was too ill to sign it and died before doing so. She did manage before her death to sign a new will which left all her estate to Theresa. She had previously discussed doing this with Phoebe, and Phoebe had said "of course you should leave you share of the house to Theresa, she's your daughter".

What is the current state of the title, legal and equitable?

CHAPTER SIX

EASEMENTS

A) INTRODUCTION

An easement is one of the class of rights in land known as "incorporeal hereditaments", or sometimes as "servitudes". It is essentially the right of one landowner to go onto the land of another and make some limited use of it. It is not a "natural right", it does not come with the fee simple, and must therefore be created as part of the relationship between the two landowners. There are many types of easements, in the sense that there are many different kinds of things which can be the subject of an easement. There is also more than one way to create an easement. Perhaps the most common kind of easement is the right of way created by express agreement of the parties, and I will use that paradigmatic situation as an illustration

Imagine that A owns land bordered on three sides by woods, and on one side by a road. A wishes to sell part of the land, and B wishes to buy part of it. But A wants to sell a part that does not border on the road. B is not going to buy if getting to the grocery store entails, at best, hacking a path through the woods - assuming that B has a right to go through the woods. If not, a helicopter will be required. The solution is simple - as part of the agreement by which she buys the land from A, B also obtains the right to cross A's land to get to the road. Presumably A will extract some price for this, some increase in B's purchase price, but it matters not to the law whether payment is given, only that the agreement has been made.

If an easement has been created by one of the methods acceptable to the law (an issue dealt with in sections (c) and (d) of this chapter), and if the right granted meets the necessary test as being the kind of thing allowed by the law of easements (an issue discussed immediately below in section (b)), then it will generally run with the land, be a part of title. That is, if the easement is created during the period that A and B own the two pieces of land, and A then sells to C and B sells to D, C and D are in the same position as landowners as A and B were. This is what makes the easement a property right, for the original agreement between A and B could be enforced merely as a contract, as could any other agreement between them. But if the particular right created by the initial contract is an easement, it becomes part of the title, part of the fee simple that each successor owner has, it has an existence independent of the identity of the owner of the land at any given time.

NOTES

1) Re Lonegren et al and Rueben et al (1988), 50 D.L.R. (4th) 431 (B.C.C.A.) concerned the requirement that the dominant and servient tenement be owned by different persons. At the time of the creation of the easement one tenement was owned by Mr and Mrs Reuben as joint tenants, the other by Mr Reuben and another person as tenants in common. Successors-in-title to the servient tenement argued, unsuccessfully, that this was tantamount to there not being different owners of the two tenements. The trial judge had held that ownership was sufficiently separate, and the Court of Appeal agreed, although without reasons.

2) In Ellenborough Park the court asks whether the easement is "inconsistent with the proprietorship or possession of the alleged servient owners". What policy considerations inform this part of the test for an easement?

3) A owns a piece of waste ground, and agrees to sell half to Wal-Mart. Wal-Mart intends to use the land for a new store, and makes an agreement with A for the use of A's retained part of the waste ground as a parking lot. Over the next couple of years about 100 cars a day are parked on A's land, the parked cars using about half of the area. A then sells to C, who tells Wal-Mart it cannot use the parking lot any longer. Wal-Mart claims it has an easement for parking. What arguments would you use on C's behalf?

POSITIVE AND NEGATIVE EASEMENTS

A great number of rights have been recognised by the courts as valid easements. A selection includes the right to tunnel under land, to maintain power lines and towers, to discharge water onto somebody else's land, to have drainage pipes and sewers underground, to string a clothes line, to use a church pew, and, my personal favourite, to use a neighbour's washroom. The list of possible easements is by no means closed, despite some judicial pronouncements hinting at that in the early part of this century, a point established in Re Ellenborough Park.

However, it should be noted that the numerous examples given here are all of what are termed "positive easements". That is, they involve A's right to do something on B's land. But there are also a few negative easements recognised - easements which give A the right to prevent B doing something with his or her land. Those known to the law are:

- the right to light
- the right to air by a defined channel
- the right to lateral support for buildings
- the right to continue to receive the flow of water from an artificial stream

Note that the support right mentioned is a right specifically excluded from the list of "natural rights" which come with the fee simple. Included within the category of "natural rights" are the right to subjacent support for land and buildings, and the right to lateral support of land. Thus while some support rights are "natural", others must be "acquired".

Phipps v. Pears involves a claim for a negative easement - an easement of protection from the weather. Do not concern yourself at this stage with how any easement might have been created. Consider the arguments for and against permitting this and other negative easements. What values animate the judiciary in this instance?

PHIPPS v. PEARS, [1965] 1 Q.B. 76 (C.A.)

LORD DENNING M.R. read the following judgment. In the 1920's there were two old houses in Warwick standing side by side, Nos. 14 and 16, Market Street. They were both owned by Ralph Spencer Field. About 1930, he pulled down No. 16 but left the old No. 14 standing. He erected a new house at No. 16, Market Street, with its flank wall flat up against the old wall of No. 14. He did not bond the two walls together, but the new wall was built up touching the old wall of No. 14.

On July 17, 1931, Ralph Spencer Field conveyed the new No. 16, Market Street, to Helena Field, but remained himself owner of the old No. 14. Helena Field disposed of No. 16 and eventually in 1951, the plaintiff bought it, as it was, standing then alongside the old No. 14. Ralph Spencer Field died and his personal representative in 1957 conveyed No. 14, Market Street, to the governors of the Lord Leycester Hospital.

So there were the two houses - a new No. 16 and old No. 14 standing side by side. In 1962, the Warwick

C) CREATION BY EXPRESS OR IMPLIED GRANT

EXPRESS GRANTS AND RESERVATIONS

The common law maintains that all easements "lie in grant"; that is, they must be created by one person with an interest in land granting the right to another. (This will usually involve fee simple owners but it need not do so). The grant of the easement may be separate from the grant of an estate or joined with it. Obviously there was a grant in the Ellenborough Park case, the original owner of the land granting to each purchaser of a house the right to use the pleasure grounds.

At this stage we need to introduce the distinction between express grants and express reservations. Consider again the example used in the introductory note to this chapter of a person's wish to sell off part of a piece of land surrounded on three sides by woods and on one side by a road. The land will be divided into two with one part "landlocked". If the seller parts with the landlocked part and gives the buyer an easement, he or she grants both an estate and an easement. This is called an express grant of an easement. However, if the seller wants to keep the landlocked part and to sell off the part that fronts the road, and in doing so makes an agreement that he or she can have access to the road over the buyer's land, he or she has reserved the easement in the grant. The seller has kept something back. This is called an express reservation of an easement, although note that it is still being created in a grant.

There will obviously be no problem in arguing that an easement has been created, whether by express grant or express reservation, if the words in the grant are clear. If the words are less than clear, however, the deed will be construed in favour of the grantee (this is a general rule). Thus in a doubtful case it will be much easier to argue for the existence of an express grant than for an express reservation. In fact, as Sandom v. Webb below makes clear the test for an express reservation is a strict one.

If you think that the word "grant" is being used here both as a verb (the process of giving) and as a noun (the transaction) you are correct. This is potentially confusing though it need not be; one can either expressly grant an easement in a grant or expressly reserve the easement in a grant.

Express grants and reservations are easy to understand, and we will do no more on them. It should be noted, however, that as it involves an interest in land the grant of an easement (by grant or reservation) must conform to the rules of the jurisdiction regarding the transfer of interests in land.

IMPLIED GRANTS AND RESERVATIONS

It was stated above that "all easements lie in grant" at common law. In reality this is a fiction, for the law permits the creation of implied easements and prescriptive easements (easements established by long use). The fiction is maintained by calling these respectively easements obtained by implied grant and easements obtained by presumed grant. Presumed grants are dealt with in section (d) below.

Implied grants and reservations represent situations in which the law implies into a land transaction which is silent on the subject an agreement to also create an easement. As with express grants, the rules are different as between implied grants and implied reservations. Mendes da Costa and Balfour, Property Law: Cases, Texts and Materials, does a good job of laying out the general principles:

> The situation in which easements are most commonly created by implication occurs when there is a severance of a possessory interest in land into two or more interests. This can happen, for example, when the owner of two lots sells one of them, when a homeowner leases one floor of his house to a tenant, or when a testator provides by will for the division of his real property for two or more devisees. In such cases, easements appurtenant to any of the several parts of the land may of course be created expressly. But if they are not, when do easements arise by implication?...
>
> The leading case on many aspects of the question, regularly quoted and followed by English and Canadian courts, is Wheeldon v. Burrows (1879) 12 Ch.D. 31 (CA); it is the best introduction to the modern law. In Wheeldon, Tetley owned a piece of vacant land and an adjoining industrial property on which had been built a factory and several workshops. In January 1876, he conveyed one lot of the vacant land to the plaintiff's husband and shortly thereafter sold the industrial land to the defendant. Although the deed to the plaintiff's husband had not expressly reserved any right over the land for the benefit of Tetley's other property, the defendant claimed, as Tetley's successor, an implied easement of light which prevented the plaintiff (who succeeded to her husband's property at his death) from constructing any buildings which interfered with the flow of light to the windows of one of his workshops. When the defendant acted on that claim by knocking down a fence which the plaintiff had erected, she brought an action in trespass, seeking an injunction. At trial, the Vice Chancellor found that no such easement had been reserved by Tetley when he conveyed the land to the plaintiff's husband and accordingly the plaintiff prevailed. The defendant appealed.
>
> In dismissing the appeal, Thesiger L.J. took the opportunity to review comprehensively the case law on the question of implied easements. His conclusion has become the leading statement of general principles:
>
> "We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easements), [1] or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted.

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[1] A quasi-easement is a right which would be an easement but for the fact that the dominant and servient tenements are owned by the same person. Example: if X owns two adjoining lots, Blackacre and Whiteacre, and uses a path over the former to get to the latter, he or she has a quasi-easement of right of way over Blackacre.

The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case.

Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense, viz., that a grantor shall not derogate from his grant. It has been argued before us that there is no distinction between what has been called an implied grant and what is attempted to be established under the name of an implied reservation; and that such a distinction between the implied grant and the implied reservation is a mere modern invention, and one which runs contrary, not only to the general practice upon which land has been bought and sold for a considerable time, but also to authorities which are said to be clear and distinct upon the matter. So far, however, from that distinction being one which was laid down for the first time by and which is to be attributed to Lord Westbury in Suffield v. Brown ... it appears to me that it has existed almost as far back as we can trace the law upon the subject."

The authorities, Thesiger L.J. went on to say, are to the effect that an implied grant must be distinguished from an implied reservation: as a result of the principle that "a man cannot derogate from his own grant ... as a general rule no implication can be made of a reservation of an easement to the grantor, although there may be an implication of a grant to the grantee". Later he said: "in the case of a grant you may imply a grantor of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed and have in fact been enjoyed during the unity of ownership, but that, with the exception which I have referred to of easements of necessity, you cannot imply a similar reservation in favour of the grantor of land".

EXCEPTIONS TO THE GENERAL RULES

In the passage quoted above Thesiger L.J. referred to exceptions to the general rules, and cited one - "ways of necessity". The others are discussed below. "Ways of necessity" are rights of way to land that would otherwise be landlocked. Because of the fiction that all easements are created in a grant, the traditional position of the common law was that even an access right to otherwise landlocked land was the product of the intention of the parties, not a result of some public policy, even though in the vast majority of cases courts have professed to find such an intention. You can see the application of this doctrine in the Wilkes v. Greenway case, discussed above in the chapter on adverse possession. The successful adverse possessor did not gain an easement because there was clearly no intention among the parties that he do so. Some commentators and judges have suggested that public policy (presumably a policy of utilisation of land by the owner) ought to require an easement of necessity in such circumstances, but this position was rejected by the English Court of Appeal in Nickerson v. Barraclough [1981] 1 Ch. 246 (C.A.), a case in which the normal implication of intention was specifically negatived by a clause in the conveyance.

In Ontario the Road Access Act, R.S.O. 1990, c. R-34 effectively provides a statutory easement of necessity. Sections 2 and 3 of the Act provide:

2. (1) No person shall construct, place or maintain a barrier or other obstacle over an access road, not being a common road, that, as a result, prevents all road access to one or more parcels of land or to boat docking facilities therefor, not owned by that person unless

(a) that person has made application to a judge for an order closing the road ...;

(b) the closure is made in accordance with an agreement with the owners of the land affected thereby;

(c) the closure is of a temporary nature for the purposes of repair or maintenance of the road; or

(d) the closure is made for a single period of no greater than twenty-four hours in a year for the purpose of preventing the acquisition of prescriptive rights.

2. (2) No person shall construct, place or maintain a barrier or other obstacle over a common road that as a result prevents the use of the road unless

(a) that person has made application to a judge for an order closing the road ...;

(b) the closure is of a temporary nature for the purposes of repair or maintenance of the road.

3. The judge may grant the closing order upon being satisfied that the cloure of the road is reasonably necessary to prevent substantial damage or injury to the interests of the applicant or is reasonably necessary for some purpose in the public interest and the judge may impose such terms and conditions as the judge considers are reasonable and just under the circumstances, including a requirement that a suitable alternate road be provided.

[In reviewing the material below on the other three exceptions, you should note that judges and writers on the subject may organise them differently than we have done, but the substance of what they say is the same.]

The second exception is that of mutual easements. An obvious example is one of support enjoyed by two houses built touching each other. Another example is discussed in Balfour and Mendes da Costa, Property Law: Cases Texts and Materials:

Thesiger L.J. further considered the question of whether there were other exceptions to the principle against implied reservation and discussed, in this connection, Pyer v. Carter (1857), 156 E.R. 1472 (Exch.) and Richards v. Rose (1853) 156 E.R. 93. In disapproving Pyer for denying any distinction between implied reservation and implied grant, Thesiger L.J. had summarized the facts of the case as follows:

"A house was conveyed to the Defendant by a person who was the owner of that house, and also of the house which was subsequently conveyed to the Plaintiff; and there had been during the unity of the ownership the enjoyment of the easement of a spout which extended from the Defendant's premises over the Plaintiff's premises, and by which water was conveyed on to the latter. But it is material to observe that the water when it came on to what were subsequently the Plaintiff's premises was conveyed into a drain on the Plaintiff's premises, which drain passed through the Defendant's premises, and in that way went out into the common sewer. Subsequently the house over which this easement existed was conveyed to the Plaintiff, and upon an obstruction of the drains in the Defendant's house, which, be it observed, immediately caused a flooding of the Plaintiff's house by the very water coming from the Defendant's house, the Plaintiff brought his action, and it was held there that the Plaintiff was entitled to maintain his action, and that upon the original conveyance to the Defendant there was a reservation to the grantor of the right to carry away this water which came from the Defendant's premises by the medium of the drain which also went through his premises".

He then said of Pyer:

"I cannot see that there is anything unreasonable in supposing that in such a case, where the Defendant under his grant is to take this easement, which had been enjoyed during the unity of ownership, of pouring his water upon the grantor's land, he should also be held to take it subject to the reciprocal and mutual easement by which that very same water was carried into the drain on that land and then back through the land of the person from whose land the water came. It seems to me to be consistent with reason and common sense that these reciprocal easements should be implied."

The third exception is provided by situations in which it is necessary to imply the reservation of an easement in order to permit a grantor to fulfill his or her obligations to a grantee in a simultaneous sale of two pieces of land. Again, Balfour and Mendes da Costa's discussion of Wheeldon deals with this exception:

Thesiger L.J. also alluded - although it was not raised by the facts of the case - to the question of easements implied in the case of simultaneous grants where the grantor, instead of severing part of his land and retaining the rest, conveys all his land to two or more grantees at one time. He referred to Swansborough v. Coventry (1832), 131 E.R. 629:

"That was a case of a sale by auction of different lots to different persons at the same time, and it was argued (and I particularly direct attention to this) that such a case must stand upon exactly the same footing as if the land in respect of which the easement was claimed had been conveyed first; consequently the case would be one in which a grant of the easement would be implied. Now observe what that admits, and the argument so dealt with upon that footing. It admits that priority in time of the conveyance was a material point for consideration, because, if it had not been admitted, then the Court might have gone to the general question, not whether the conveyances were at the same time, not whether one preceded the other by a few minutes, or a few days, or by a few years, but whether upon the severance of the property there was this (if I may use the expression) continuous and apparent easement in respect of which a reservation might be claimed, or an implication of a grant might be made. Lord Chief Justice Tindal deals with the matter, as it appears to me, upon the supposition that the general maxim is that a man who conveys property cannot derogate from his grant by reserving to himself impliedly any continuous apparent easements; he says 'It is well established by the decided cases that where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possesses the adjoining land and sells the house to another person, although the lights be new he cannot, nor can any one who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights. The principle is ...that no man shall derogate from his own grant.... And in the present case, the sales to the Plaintiff and the Defendant being sales by the same vendor and taking place at one and the same time, we think the rights of the parties are brought within the application of this general rule of law'".

The final exception is much more general. It is contained in the quotation from Pwllbach Colliery Company v. Woodman cited in Sandom v. Webb below: "The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used".

The three cases below deal with various aspects of the implied grant and reservation rules and exceptions. Wong involves an implied grant, and you should ask yourself whether this is a case falling under the general rule on implication or under the necessity exception or under the fourth exception. Sandom v. Webb and Barton v. Raine concern implied reservations, and in particular the operation of the fourth exception delineated above.

among the ranks of conveyancers. It is trite to repeat that every case is to be decided on its own fact, yet the facts of this case surely bear little resemblance to the facts that can be expected to be encountered in most cases involving adjoining property owners who share facilities such as driveways with their neighbours.

Furthermore, on the facts of this case, this is not a case in which the defendants came to the position in which they now find themselves, without any notice of a user of their property contrary to what they now assert to be their right, title and interest in it. At the time they purchased the property, the driveway was no less a physical fact than it had been in 1952, and the manner of its use could have been no less apparent to them than to any other person who chose to observe the physical features of the two properties. If it were necessary to do so, I would conclude that the defendants in this case in fact had actual notice of the very user they later chose to dispute when they erected the fence which blocked through access to the plaintiff's garage. In this case the defendants, before they concluded the purchase of their property, had clear cause to suspect an adverse possessory interest, and could readily have called for a declaration of possession by the vendor. Yet there is no evidence that they did so; on the contrary, the evidence is that they accepted the situation as they came to it and continued to do so until the time of the incident, involving the parking of the defendant's car in the driveway, which seems to have triggered the dispute now before this Court....

PROBLEMS

1) A owned a large lot, and sold an undeveloped part of it to B, knowing that B intended to establish a camping and trailer park on it. Unknown to A was the fact that an underground sewer went across her land from what was now B's land. B also did not know of this at the time that he bought the land. A later developed her land in a way that interfered with the underground sewer, and B sued, alleging that he had an easement to use the sewer.

Can B claim the easement by way of implied grant? Under which branch or branches of the implied grant rules might he do so?

2) The following is part of the principal question from a 1994 final exam. How would you deal with the easement issues?

In 1985 the residents of Smalltown, Ontario, were delighted to hear that Arthur Bellamy, a major player in the American electronics industry, had decided to locate a manufacturing plant in Smalltown, to be operated by his principal company, AB Enterprises. In June of that year he visited Smalltown and chose a site for the factory. That site was a piece of waste ground just outside the town and close to the main highway to Toronto, which ran in an east-west direction. The owners of the land were two sisters Catherine and Charlotte Delaney, but Charlotte lived in Toronto and had long ago told her sister she could do what she wanted with it. The land was rectangular in shape, fronting the road for about 400 metres and running directly back in a northwards direction for about a kilometre. Although it was just one parcel, it was physically comprised of two different kinds of land. The area closest to the road was a disused gravel pit. The more northerly part was cleared waste land with a stream running through its north-eastern corner. A partly-paved side road ran directly back from the main road along the eastern edge of, although wholly within, the Delaneys' parcel. This side road stopped at the stream. There was

another way to reach the northern part of the land, via a dirt road which ran back from the land in a northerly direction for five miles before it reached a country road.

During his visit Bellamy negotiated with Catherine Delaney for a lease of the waste land. The two got on well, with Bellamy even joining Delaney and her family for a swim in the stream one afternoon - a favourite activity of the Delaney family. They reached the stream, of course, by driving along the side road. In August 1985 a 15-year lease was concluded for the waste land part of the Delaneys' land....

Construction of the new electronics factory started almost immediately, and was completed by mid-summer of 1986. All vehicles involved in the construction used the side road to reach the leased land, and Bellamy made some improvements in the surface of that road to make access easier. In addition, and without asking Delaney for permission, he dug trenches across the Delaneys' retained land and installed pipes to link up with the town's water and sewage system. This was required by the terms of his official permits to build and operate the factory....

Bellamy's venture was successful. Unfortunately after a few years problems arose in his relationship with Delaney. The principal cause of these was that an upturn in the gravel market led Delaney to start working the gravel pits on her land. This created a great deal of dust, which while it did not stop production did interfere with some of the delicate machinery and caused Bellamy extra expense in putting in screens and upgrading his air-cleaning systems. He remonstrated with Delaney, saying that he would not have leased the land had he known that there would be a gravel pit operating next door and that Delaney was breaching the covenant not to unreasonably interfere, and other covenants. Delaney carried on after getting advice from her lawyers that she had done nothing wrong, and Bellamy finally told her in the late summer of 1993 that he was going to sue. He filed a suit a few days later. Delaney was furious at this, and retaliated by blocking off the side road to all vehicles trying to get to Bellamy's land. Those vehicles now had to take a long detour to get to the dirt road.

In turn, Bellamy put up "No Trespassing" signs on the part of the stream still used by the Delaney family for swimming, and ordered them to leave when next they came for a swim. Bellamy also immediately filed another suit arguing that he had a right to use the road. Delaney was furious. She dug up the part of the water pipeline nearest the road thereby cutting off the water supply, and also went to court, arguing that she had a right to use the stream for swimming. Bellamy also put in a statement of claim, to the effect that he also had a right to run the pipes under Delaney's land.

D) CREATION BY PRESUMED GRANT

This section examines the third of the three ways by which easements can be created - by "presumed" grant. This is also known as creating easements by prescription. Although the crucial factor is long use the fiction of creation by grant in a transaction between parties is retained in English law through the notion that the grant of an easement either preceded "legal memory" (pre-1189) or was made in modern times (post-1189) but had been lost. The first of these types of presumed grant has never been available in the Canadian common law of real property. The second was once available but in both Canada and England legislation, initially introduced to simplify and standardise the rules on "lost modern grants", now governs the vast majority of claims. These legislative provisions, initially contained in the English Prescription Act of 1832, are contained in Ontario's Limitations Act. For the purposes of this course you need only concern yourself with prescriptive easements arising under the Act.

Prescription is not like adverse possession, despite the fact that the Limitations Act and the notion of long use are common to both. Prescription applies only to non-possessory rights and requires lesser acts than possessory title does, and it is not even formally cast as a defence. There are other significant differences also, as outlined in the legislative provisions reproduced below and in the extract from Mendes da Costa and Balfour which follow them. The relevant sections of the Limitations Act are:

31) No claim that may be made lawfully at the common law, by custom, prescription or grant, to any way or other easement, or to any water course, or the use of any water to be enjoyed, or derived upon, over or from any land or water of the Crown or being the property of any person, when the way or other matter as herein last before-mentioned has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years shall be defeated or destroyed by showing only that the way or other matter was first enjoyed at any time prior to the period of twenty years, but, nevertheless the claim may be defeated in any other way by which it is now liable to be defeated, and where the way or other matter as herein last before-mentioned has been so enjoyed for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that it was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

32) Each of the respective periods of years mentioned in sections 30 and 31 shall be deemed and taken to be the period next before some action wherein the claim or matter to which such period relates was or is brought into question, and no act or other matter shall be deemed an interruption within the meaning of those sections unless the same has been submitted to or acquiesced in for one year after the person interrupted has had notice thereon and of the person making or authorizing the same to be made.

33) No person shall acquire a right by prescription to the access and use of light or to the access and use of air to or for any dwelling-house, work-shop or other building, but this section does not apply to any such right acquired by twenty years use before the 5th day of March 1880.

35) No easement in respect of wires or cables attached to property or buildings or passing through or carried over such property or buildings shall be deemed to have been acquired or shall hereafter be acquired by prescription or otherwise than by grant from the owner of the property or buildings.

These sections should be read in conjunction with the following commentary by Mendes da Costa and Balfour, Property Law: Cases, Texts and Materials

Under these provisions, the following are the points of significance:

1) Section 31 establishes two different periods for the creation of prescriptive easements. These periods are twenty and forty years.... After twenty years of adverse use, an easement cannot be defeated by showing that user began after 1189. This merely facilitates the operation of prescription at common law by eliminating one kind of defense. Thus, while an easement by prescription at common law could not be created in Ontario apart from this provision, section 31 makes "time immemorial" irrelevant and enables a prescriptive easement to be created at common law in this province. Apart from showing user began after 1189, a claim for a prescriptive easement after twenty years' adverse use may still be defeated by any other defence that was available at common law.... After forty years of adverse use, the easement becomes "absolute and indefeasible". This is not as definite as it appears. The basic rule that prescription must operate for and against a fee simple estate still applies. Thus, a tenant cannot prescribe against his landlord .... Also a claim based on forty years' adverse use may be defeated, as could a twenty year claim, by showing that the user was forcible or secret, or enjoyed by written permission. On the other hand, a forty year claim cannot be defeated, as a twenty year claim can, by proving it was enjoyed by oral permission....

2) Section 31 only comes into play when there is litigation and the relevant period of user must immediately precede the bringing of the action. Thus, forty years of adverse use does not of itself create an "absolute" prescriptive easement. An action must be brought and the necessary period of enjoyment must be immediately prior to the commencement of that action.

3) The period must be "without interruption". This does not mean mere nonuser by the person claiming the easement. It means that the claimant has not been obstructed from enjoying the use.

4) No act is deemed to be an interruption for the purpose of section 31 unless the person claiming the easement has submitted to interruption for one year.

Example of the operation of sections 31 and 32 X has been crossing Y's property as if he had an easement for 19 years and one day. The next day Y prevents X from crossing by placing an obstruction in the way of passage. At this time, X has no right to cross as he cannot show twenty years of enjoyment. However, if X sues for a prescriptive easement one year from the day after he had enjoyed the use for nineteen years, he will succeed. X will now be able to show twenty years of enjoyment prior to bringing the action. The interruption will not count as it was for one year less a day. X could not have brought his action sooner as he would have been short of the twenty year period required. An action brought by X on the following day will be too late as the interruption will now have lasted a year and section 31 can no longer apply....

The law relating to prescription is both confusing and complex. Confusion and difficulties under the present law arise from:.....

- having two different periods under the statute when one would be sufficient
- tying the prescription periods under the statute to the commencement of an action;
- requiring long periods of adverse enjoyment, considering that ten years' adverse possession is sufficient to create a possessory title;
- the poor drafting of the statutory provisions....
- the obscureness of the law as to the meaning of "user as of right"; and
- the difficulty or undesirability, in some cases, of having to make "interruptions" in the running of time by the creation of physical obstructions.

USER AS OF RIGHT

Merely establishing that the right has been exercised for the correct period of time is not enough to make out a claim for a prescriptive easement. The common law rules on the nature and quality of use also have to be adhered to. These were developed in the context of "lost modern grant" claims, but have always been used for statutory prescription also. It might be useful to think of these as laying down requirements for the quality of use of an alleged easement in the same way that the courts developed rules for the quality of possession in adverse possession law.
The principal rules are twofold. First, the use must be continuous. This does not mean that the claimant must have used the alleged easement every day. Continuity is judged according to the nature of the right being asserted - see the discussion of Axler v. Chisholm below.

Second, the claimant of the easement has to have exercised "user as of right". This means that the claimant has to have exercised the alleged right in such a way that he or she can be seen as having said: "Of course I have a right to do this". Conversely, the servient tenement owner can be said to have acquiesced in the use by right. This requirement of "user as of right" is said to consist of three sub-rules, summarised in the Latin maxim nec clam, nec vi, nec precario - no secrecy, no violence, no permission.

"No Violence" requires the claimant to have used the easement without brushing aside significant protest by the owner. Note, however, that similar acts can represent both an assertion of a right and use not by right but by violence. Take the case of a right of way which the servient tenement owner blocks off. If the dominant tenement owner removes the obstruction the court may well find that he or she is saying: "I am removing the obstruction because it is my right to use this path and you have no right to block it". If the servient tenement owner does nothing further, the court might also say that he or she has acquiesced to this assertion of a right. But if another obstruction is placed in the way, and again removed, we get much closer to non-acquiescence and a violation of the "no violence" rule. Thus whether an action constitutes "user as of right" or user by violence can depend on all the circumstances.

"No secrecy" means that the easement must be used openly so that the servient tenement owner knows about it and acquiesces. When dealing with the "no secrecy" requirement courts use phrases such as openly, notoriously, without stealth, etc. This is a good statement of the principle: "the rights alleged may only be claimed if the benefit was enjoyed as of right, in an open and notorious manner sufficient to convey to the mind of the servient owner the fact that a claim was being asserted which, if it was acquiesced in, would ultimately ripen into a right". Thus again acquiescence is at the root of prescription.

A case on secrecy is Axler v. Chisholm (1977), 79 D.L.R. (3d) 97 (Ont. H.C.). The plaintiff argued that she was entitled to a prescriptive easement over a part of the defendant's lake front lot for the purpose of storing a portable dock. The plaintiff had stored her portable dock on the defendant's land from October to May every year between 1945 and 1969, at which point the defendant objected. The evidence showed that until 1952 the owner of the servient tenement only visited it twice a year during the summer; it was otherwise undeveloped and unoccupied. In 1952 the lot was sold, and the new owner probably came to know about the storage of the portable dock

and permitted it. In 1968 the property was again sold, to Chisholm, who, the following year, objected to having the dock stored on his land. Craig J. held, inter alia, that no prescriptive easement had been established. The necessary 20-year prescription period ran from 1950 until the plaintiff began her action in 1970. And on the facts there had not been 20 years of continuous "user as of right". The fact that the use was seasonal and intermittent did not of itself prevent it from being continuous, for continuous means different things in different circumstances. But the intermittent nature of the use meant that in the circumstances it was "clam". The "no secrecy" requirement meant that the servient tenement owner must have had knowledge, actual or constructive (the means of knowledge), of use of the easement, and the onus of proving such knowledge rested with the plaintiff. In this case the plaintiff was unable to show that the owner between 1950 and 1952 had such knowledge, since the dock was stored on the land in wintertime and the owners only visited the lot in summer. Craig J stated: "it should not be held that an owner of a vacant summer cottage lot has an obligation to inspect his or her boundaries of the lot at certain seasons of the year; or that failure to do so would be to risk loss of property rights".

The issue of permission is dealt with in Garfinkel v. Kleinberg, below. As you read it pay special attention to the difference between acquiescence by the servient tenement owner and permission from that person.

GARFINKEL v. KLEINBERG, [1955] 2 D.L.R. 844 (Ont. C.A.)

The judgment of the Court was delivered by F. G. Mackay J.A.: This is an appeal by the defendants from the judgment of His Honour Judge Lovering of the County Court of the County of York, dated January 26, 1954. The plaintiff is the owner of the premises known as 120 Markham St. in the City of Toronto and the defendants are the owners of the premises immediately adjoining on the south, known as 118 Markham St. There is a party-wall between the two houses. The plaintiff's claim is that he has acquired a prescriptive right to use a chimney in the wall of the defendants' house. This chimney is entirely on the property of the defendants and is located at a point close to where the walls of the two houses join to become a party-wall. The defendants plead that if the plaintiff used the chimney he did so in secret and without their knowledge.... At the trial the defendants attempted to prove that the use of the chimney by the plaintiff first commenced in the year 1949. The learned trial Judge rejected this defense. He also found against the defendants on the other defenses pleaded and held that the plaintiff was entitled to a declaration that he had acquired a prescriptive right to the use of the chimney, and granted an injunction restraining the defendants from interfering with such use. I am of the opinion that the learned trial Judge was right.

The evidence relating to the ownership and occupancy of the two properties is as follows: The plaintiff purchased the property known as 120 Markham St. from Gustave and Oscar S. Kling by deed dated July 31, 1911, and registered on January 10, 1912. The vendors also owned the property immediately adjoining on the south and in their deed to the plaintiff they reserved the right to use the south wall of the plaintiff's house as a party-wall for a house to be built on their remaining land. The plaintiffs' evidence is that this house, now known as 118 Markham St., was built in 1912. Prior to the building of that house there was a chimney built against the south wall of the plaintiff's house and used by him in connection with his furnace. In building No. 118 Markham St., the Kling brothers tore down this chimney and erected the chimney that the plaintiff now claims a prescriptive right to use. He says that at that time the workman made an opening to the chimney through his south wall and the adjoining wall of house No. 118 for this purpose, with the knowledge and consent of the Kling brothers, and that he has used it continuously from that time until the difficulties arose between himself and the defendants in 1952, when this action was commenced. There was no agreement in writing nor was there any further oral discussion as to the plaintiff's use of this chimney during the occupancy of 118 Markham St. by the Kling brothers or by any subsequent owners of that property, although there was a written agreement in the year 1913 relating to overhanging eaves and drains. By deed dated September 15, 1921, the Kling brothers sold house Number 118 to one Harry Hurovitz. Hurovitz sold the property

E) THE SCOPE OF EASEMENTS

An easement granted for one purpose cannot be used for another. See Malden Farms Ltd. v. Nicholson (1956), 3 D.L.R. (2d) 236 (Ont. C.A.). In 1916 the owner of the servient tenement granted the owner of the dominant tenement (which was farmland) a right of way across his land for persons, animals and vehicles. In the early 1950's the successor in title to the dominant tenement began to develop the land as a beach resort, and the right of way was used by increasingly large numbers of vehicles. The Court of Appeal sustained an injunction granted to the successor in title to the original owner of the servient tenement. Aylesworth J.A. noted that the applicable principles were to be found in Gale on Easements:

"According to the present state of the authorities, it appears that the grantee of a right of way is not entitled to increase the legitimate burden. But, on the other hand, the legal extent of his right may entitle him to increase the amount of inconveniences imposed upon the servient tenement - e.g., by placing on the dominant tenement new buildings or increasing the size of old buildings. And the legal extent of the right (in other words, the mode as distinct from the extent of user) must, it seems, be ascertained from the intention of the parties at the time when the right was created.

He then held that "the burden of the easement has been markedly increased.... [It] is now burdened, not with a private right of way in favour of appellant, his heirs and assigns, as originally contemplated, but with a use of the way for appellant's commercial purposes by great numbers of the public who travel over respondent's lands much as though the same constituted a public highway or a busy toll-road." Thus the appellant's use of the right of way was an "unauthorized enlargement and alteration in the character, nature and extent of the easement."

See also Re Gordon et al and Regan et al (1985), 15 D.L.R. (4th) 651 (Ont. H.C.). The parties were each entitled to a right of way over a mutual private drive to reach their respective lots. In 1922 the predecessors in title to one of the parties had bought some adjoining land and built a garage on it and then used the drive to reach that land also, which practice was continued by the party in this action. But he now wanted to convert the house into two semi-detached houses and to allow the purchasers of the second house to use the right of way to get to the adjoining land and garage. Griffiths J. held first that a right of way remains attached to each part of a dominant tenement if it is sub-divided and that, absent any specific restrictions in the grant, a reasonable increase in use is permissible. He then held that the proposed use was improper because a right of way appurtenant to one lot cannot be used colourably to reach a different, adjoining lot.

F) TERMINATION OF EASEMENTS

There are a number of ways to extinguish an easement. First, by statutory provisions allowing an application to the court for an order terminating the easement. While these are common with respect to restrictive covenants (see chapter seven below), few common law jurisdictions have such legislation for easements. In Canada only British Columbia does: Property Law Act, R.S.B.C. 1979, c. 340, s. 31 (2).

Second, an easement is terminated by operation of law if the purpose for which it is granted comes to an end, or if the right is abused (as in the Malden Farms case noted above), or if it was granted with a time limit and the time expires, or if the owner of the dominant and servient tenement becomes the same person. Note, however, with respect to this last point that if the same person comes into possession of the two tenements under different estates, the easement will merely be suspended.

Third, an easement can be terminated by release, express or implied. The burden of proof is very high on the owner of a servient tenement who wants to argue implied release; merely showing that the use was stopped for some period of time will not suffice. The stoppage must amount to an abandonment of the easement. In Barton v. Raine, above, Thorson J.A. dealt thus with an argument that the easement that a period of non-use had terminated the easement: "the interruption in its use which occurred following the father's stroke did not impair that easement, which, once acquired, could only be lost by non-user on evidence clearly establishing an intention to abandon it. As pointed out by the trial Judge, the circumstances of the non-user in this case were not consistent in any way with an intention to abandon the right."

CHAPTER SEVEN

RESTRICTIVE COVENANTS

A) INTRODUCTION

Restrictive covenants are, like easements, a form of incorporeal hereditament. Begin with the notion that a covenant is an agreement under seal, one contained in a deed. In the context of real property law, it is an agreement by which one person agrees to do something, or not to do something, with his or her land, for the benefit of the other party. As with an easement created by express grant, we can use contract law to say that the terms of the covenant are enforceable as between the original parties. But, again similarly to an easement, the issue is when the terms of the covenant become attached to the land, as part of title to it, and are therefore enforceable by and against successors in title to the original contracting parties. That is, at what point will the law consider the covenant to be an interest in land.

An obvious question which will occur to you at this point is - what is the difference between covenants and easements? We are not going to answer this fully at the moment, because the entire answer requires us to understand the whole chapter. But for the present you can usefully think of a covenant as (a) requiring an owner to do something or not do something with his or her own land, whereas an easement gives its holder the right to go onto another's land, and (b) as an agreement containing terms and conditions that would not amount to an easement by the characteristics outlined in Ellenborough Park or because of the restrictions on negative easements noted in Phipps v. Pears. There are other differences, but the point is that covenants principally affect servient land, while easements only do so inferentially, and that covenants are potentially much wider in scope than easements - although there are limits on which type of covenants can go with title. We will see that covenants are much more difficult to enforce against successors-in-title than easements, and thus you would never attempt to argue that something like a right of way was a covenant.

A paradigm restrictive covenant (that's a term of art which will be explained later) would be a limit on the kind of development that one land owner could undertake. That is, you own land and sell half of it off. You know the purchaser is a yuppie stockbroker who would want to build a large, ugly house and paint it pink. You insert a clause in the conveyance that would prevent this. Restrictive covenants are therefore a form of private zoning. Despite the introduction of public zoning they remain part of the law and are widely used. They are used for a variety of ends, which will appear more or less acceptable depending on one's political perspectives. They have been used in the past to enforce racial segregation - refer back to Re Noble and Wolf. Generally, they "can be useful instruments in the hands of a 'nimby' ": Ziff, Principles of Property Law, p.360. Later in this chapter, section F, we will look more closely at one modern type of covenant - the conservation covenant.

At this stage we need to introduce some terms. The covenantor, the person who agrees to do something or not to do something, has what is called the burden of the covenant. The covenantee, the person for whose benefit the covenant is made, has what is called the benefit of the covenant. Enforcing the burden and being able to enforce the benefit against or for a successor in title to the original party is known as running the burden or the benefit of the covenant.

Let us now return to the situation with which we began - two persons make a covenant related to land which is enforceable between the original parties. When will it be enforceable for and against successors-in-title? This question brings a rather complicated answer, for the rules on running covenants are "unnecessarily complex and occasionally illogical": Ontario Law Reform Commission, Report on Covenants Affecting Freehold Land, 1989, p. 1. We will begin with the common law rules, and then deal with equity.

B) COVENANTS AND THE COMMON LAW

The general rule at common law is that the burden of a covenant will not be run in any circumstances: see Austerberry v. Oldham below. The covenantee would still have an action in contract against the original covenantor, but this would be useless once that person had conveyed the land to another.

The common law, however, will allow the benefit to run in certain circumstances. In other words successors in title to the covenantee can enforce a covenant against the original covenantor, but not against the latter's successors.

There are three conditions which must be met before the common law will even allow the benefit to run. They are:

1) The original covenantee must have had the legal estate in the land which is to be benefitted.

2) The successor in title to the original covenantee must obtain the same legal estate as the original covenantee, and the benefit must have been intended to run with the land, not to have been a mere personal covenant.

3) The covenant "must touch and concern the dominant land" (the land to be benefitted). This is what the Austerberry case is principally about.

NOTES

1) We will return to the question of whether or not the burden of the covenant should run at common law later in this chapter. It is necessary to first understand when and why the burden of the covenant will run in equity.

2) You might have some doubt as to correctness of the decision in Austerberry that the covenant there did not touch and concern the land. The meaning of this term is not easy to grasp. The leading definition is from Rogers v. Hosegood [1900] 2 Ch. 388: "the covenant must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land". That is, the covenant must relate to the use which may be made of the servient land and such limitation on use or requirement of particular use must affect the dominant land as land, must not be personal. We will return to the meaning of "touch and concern the land" later in this chapter.

3) In Smith et al v. River Douglas Catchment Board, [1949] 2 K.B. 500 (C.A.) various landowners agreed to contribute towards riverbank work if the Board agreed to maintain the banks afterwards. When the bank later burst successors in title to the original landowners sued on the covenant. The court held that the benefit of the covenant could run since it touched and concerned the land. You should note that in this case the Board had no land of its own, and take from that the point that the requirements for running the benefit do not include a requirement that there be a dominant and servient tenement. As we will see, this is a requirement for running the burden in equity.

C) RESTRICTIVE COVENANTS: RUNNING THE BURDEN IN EQUITY

INTRODUCTION

We have seen that the common law rule is that the burden of a covenant will not run. But equity will run the burden in certain circumstances. This is where the term of art "restrictive covenants" comes in. A restrictive covenant can be defined as a covenant that equity will enforce against successors in title to the original covenantor.

The rules on running the burden of covenants in equity are complicated, and that complexity is exacerbated by the fact that there are also requirements for running the benefit in equity. In addition, you will not find complete agreement among either judges or scholars on how best to organise all of the rules. What follows is our view of how best to do this.

There are four principal requirements to be met before equity will run the burden of a covenant, as follows:

1) The covenant must be negative in substance; hence the term "restrictive" covenant. It may be positive in form, as the covenant is in Tulk v. Moxhay: "keep and maintain the said piece of ground ... in an open state, uncovered with any buildings". But this is negative in substance - it is a prohibition on development.

2) There must be a dominant and servient tenement.

3) The covenant must touch and concern the land of the covenantee.

4) Successors-in-title to the covenantor must have notice of the covenant.

The first case in this section, Tulk v. Moxhay, is considered to be the origin of the rule that equity will run the burden of some covenants. Ask yourself what the basis of the decision is in Tulk, and which of these requirements it appears to lay down?

TULK V. MOXHAY (1848), 41 E.R. 1143 (Ch.)

In the year 1808 the Plaintiff, being then the owner in fee of the vacant piece of ground in Leicester Square, as well as of several of the houses forming the Square, sold the piece of ground by the description of "Leicester Square garden or pleasure ground, with the equestrian statue then standing in the centre thereof, and the iron railing and stone work round the same," to one Elms in fee: and the deed of conveyance contained a covenant by Elms, for himself, his heirs, and assigns, with the Plaintiff, his heirs, executors, and administrators, "that Elms, his heirs, and assigns should, and would from time to time, and at all times thereafter at his and their own costs and charges, keep and maintain the said piece of ground and square garden, and the iron railing round the same in its then form, and in sufficient and proper repair as square garden and pleasure ground, in an open state, uncovered with any buildings, in neat and ornamental order; and that it should be lawful for the inhabitants of Leicester Square, tenants of the Plaintiff, on payment of a reasonable rent for the same, to have keys at their own expense and the privilege of

NEGATIVITY AND THE REQUIREMENT OF A DOMINANT TENEMENT

Because Tulk v. Moxhay did not lay down a rule that a covenant must be negative before equity will enforce the burden against successors in title to the covenantor, a few cases in the nineteenth century applied the rule to positive covenants as well. However, the vast majority of reported cases that followed Tulk concerned negative covenants, and in Hayward v. Brunswick Permanent Building Society (1881), 8 Q.B.D. 403 (C.A.) it was held that Tulk applied only to restrictive covenants.

Tulk also did not require, in terms, that there be a dominant and servient tenement. And as with the requirement of negativity, one can find cases decided in the nineteenth century that enforced burdens even though either the covenantee or successors in title to the covenantee did not have land to be benefitted by the covenant. The need for a dominant tenement was firmly established in the early twentieth century in two cases: Formby v. Baker, [1903] 2 Ch. 539 and LCC v. Allen, below. If this requirement is not met, the covenant is said to be, as it is, a purely personal one. Does LCC v. Allen tell you why there must be a dominant tenement? Why do you think it is necessary?

LONDON COUNTY COUNCIL v. ALLEN AND OTHERS, [1914] 3 K.B. 642 (C.A.)

Buckley L.J. read the following judgment: This action is brought by the London County Council upon an indenture dated January 24, 1907, made between the defendant Morris Joseph Allen of the one part and the London County Council of the other part, claiming certain mandatory injunctions and damages for breach of a covenant contained in that indenture. Before the date of the execution of the deed the defendant M. J. Allen had applied to the London County Council for their permission under s.7 of the London Building Act, 1894, to his laying out a certain new road, called Galloway Road, running from south to north, and a further small portion of road at the northern end of Galloway Road running from east to west in continuation of a road called Dunraven Street. The London County Council gave their permission upon the terms, amongst other things, that this defendant should enter into a certain deed of covenant, and that was the deed of January 24, 1907. The covenant in question was as follows: "The applicant" (that is to say, the defendant M. J. Allen) "doth hereby for himself, his heirs and assigns, and other the persons claiming under him, and so far as practicable to bind the land and hereditaments herein mentioned into whosesoever hands the same may come, covenant and agree with the council that he and they will not erect or place, or cause or permit to be erected or placed, any building, structure, or other erection upon the land shewn by green colour on the said plan without the previous consent in writing of the council so to do, and that on every conveyance, sale, charge, mortgage, lease, assignment, or other dealing with the land herein mentioned or any part thereof he will give notice of the aforesaid covenant in every conveyance, transfer, mortgage, charge, lease, assignment, or other document by which such dealing is effected." The deed recited (but contrary to the fact) that the applicant was the owner in fee simple of the land in question. He was not. He had at the date of this deed of covenant merely an option of purchase, which might or might not result in his becoming owner of the land. The portions coloured green were two, namely, plot No. 1, being the continuation of Dunraven Street to the west of Galloway Road, and plot No. 2, being the continuation of Galloway Road to the north of Dunraven Street. It is necessary to deal with these two plots separately.

First as regards plot No. 1. On July 3, 1908, this was conveyed to the defendant M. J. Allen in fee. On the same

NOTES

1) Galbraith tells us that a restriction on who may buy the servient land does not relate to the dominant land as land, it was personal. Austerberry v. Oldham, above, held that a covenant to repair a road was for public benefit, and does not touch and concern the land of particular landowners. In Zetland v. Driver [1939] Ch 1 (C.A.) the covenant was to the effect that no alcohol be sold on the servient land and that "no act or thing shall be done or permitted which in the opinion of the vendor [dominant tenement owner] would be a public or private nuisance or prejudicial or detrimental to the vendor or owners or occupiers of any adjoining property or to the neighbourhood". The servient tenement owner argued that this did not touch and concern because it was made not only for the dominant tenement but also for the neighbourhood as a whole. Farwell J. rejected this contention, holding that "the paramount purpose" of the covenant "is to benefit and protect the unsold land of the vendor.... [n]othing which would be a nuisance or annoyance to an adjoining owner of the neighbourhood is within the covenant, unless it is also injurious to the unsold land of the vendor".

2) The most common form of restrictive covenant is a limitation on development, and therefore one can assume that such a covenant touches and concerns the land. But how much land? In Earl of Leicester v. Wells-next-the-Sea Urban District Council [1973] 1 Ch 110 the court accepted that restrictions on a 19-acre plot could benefit a 32,000 acre estate. In Re Ballard's Conveyance [1937] Ch 473 building restrictions on an 18-acre plot were held not to be enforceable in favour of an estate of 1,700 acres. The court stated: "it appears to me quite obvious that while a breach of the stipulations might possibly affect a portion of that area in the vicinity of the applicant's land, the largest part of this area of 1,700 acres could not possibly be affected by any breach of any of the stipulations".

3) In Jain v. Nepean (1989), 69 O.R. (2d) 353 (H.C.J.) a municipality sold lots in an industrial park. Wishing to encourage development and not speculation, it inserted covenants requiring the purchasers to build by a certain date, which were said to be for the benefit of other lands of the municipality. They were held to be positive covenants, but in addition it was said that they did not touch and concern any land retained by the municipality, but benefitted the municipality qua municipality. They were an adjunct to municipal development policy.

D) RESTRICTIVE COVENANTS: RUNNING THE BENEFIT IN EQUITY

INTRODUCTION

As a restrictive covenant is an equitable interest in land, equity also devised rules for when it would run the benefit of one. That is, one cannot rely on the common law rules to run the benefit.

The principal rule that must be met before the benefit of a covenant will run with the land of the covenantee in equity is that it must be intended to do so, that "the assignee must demonstrate entitlement to the benefit". If he or she cannot, the covenant is seen as a purely personal one to the original covenantee. Some authors state that it is also necessary for the covenant to touch and concern the land of the covenantee, but I have included that among the requirements for the burden running discussed in the previous section.

There are three ways to establish sufficient intention, to "demonstrate entitlement". First, the benefit can be annexed to the dominant land by express language in the covenant. One can use the term "annexed', or state that the covenantee makes the covenant as owner of the lands. See the covenant reproduced in section F below.

Second, the benefit can be assigned, as can any contractual right in equity. This must be expressly done at the time of the transfer of the land by the covenantee and, as with annexation (see the Sekretov case below), Canadian law likely requires clear language as to the land being benefitted.

Third, both the benefit and the burden will run for restrictive covenants contained in what is known as a "building scheme" or a "scheme of development". The builder of a sub-division may want to impose limits on uses as lots are sold off, both to keep other lots attractive and to be able to offer consistency in the type of neighbourhood to prospective purchasers. But the restrictive covenant rules create problems here. For one thing, the developer will be the contracting party whereas the real covenantees are the other lot owners, present and future. For another, each lot owner really has both benefits and burdens in relation to all other owners. None of these problems are insurmountable, but they make the situation "unwieldy", and getting around these problems requires that "a careful pattern be followed involving the granting of reciprocal covenants on each initial sale": Ziff, Principles of Property Law, p. 373. The common law thus made an exception of building schemes and allowed common covenants to run for and against all lots provided four conditions were met: (i) all lots must derive title from a common vendor; (ii) there must be a clear intention that the covenants apply equally in benefit and burden to all lots; (iii) the geographical area covered by the scheme must be clearly defined: (iv) all purchasers must buy lots with the expectation that the covenants were to be enforceable against all other purchasers.

The requirements of a common vendor and of clear definition of the area covered were recently confirmed in Berry et al v. Indian Park Association (1999) 174 D.L.R. (4th) 511 (Ont. C.A.). A rural community development was built in 1974 and 1975, with a variety of covenants registered. In 1988 the development was added to by buildings on adjacent lands, constructed by another

developer. That developer, and the purchasers of the new houses, agreed to the restrictions, but following a dispute the Court held that the original covenants were not enforceable against the owners of the later buildings. There was no common vendor, and the new houses were not part of the original scheme, because they were not contemplated in the mid-1970s.

The Sekretov case below is an attempted annexation case. The issue is whether the benefit can be annexed to the dominant land if the land to be benefitted is not delineated in the covenant itself. In Galbraith v. Madawaska Judson J. also dealt with this question. After discussing the "touch and concern" issue (above), he stated:

"There is nothing in the conveyance from the club to Mrs. Firth which attempts to annex the benefit of the covenant to any land retained by the club. Further, there is no evidence anywhere in the record to indicate whether the club had any such land capable of being benefited. The grantee simply covenants for herself, her heirs, executors, administrators and assigns, with the grantor, its successors and assigns, to the intent that the burden of the covenants should run with the lands during the corporate existence of the club but nothing is said about any other lands. This fails to meet what I think must be regarded as the minimum requirements that the deed itself must so define the land to be benefited as to make it easily ascertainable....

There was exactly the same situation in Can. Construction Co. v. Beaver (Alta.) Lumber Ltd., [1955], 3 D.L.R. 502, S.C.R. 682. In that case Beaver Lumber was the owner of two parcels of land, A and B. It conveyed parcel A in 1944 and took a covenant that the grantee would not, for a period of 25 years, carry on a lumber business on the lands. The lands eventually came into the hands of Canadian Construction Co. with notice of the covenant. There was nothing in the agreement containing the covenant which annexed its benefit to parcel B on which Beaver Lumber Ltd. was carrying on a lumber business. The inference drawn by the learned trial Judge was that the covenant was intended by the parties to be personal to the covenantee and not for the benefit of parcel B. The Court of Appeal reversed the finding of the trial Judge but the judgment at trial was restored in this Court. The majority of the Court did not find it necessary to consider the extent of the admissibility of evidence of surrounding circumstances, for the purpose of indicating the existence or situation of other land of the covenantee intended to be benefited. However, the plain implication in the judgment of this Court in affirming the trial judgment was that a restrictive covenant contained in an agreement which omits all reference to any dominant land, although it sets out the restrictions placed upon the servient land, is unenforceable by the covenantee against a successor in title of the covenantor, since such an agreement expresses no intention that any other lands should be benefited by the covenant. A covenant running with the land cannot be created in this manner and in the absence of any attempted annexation of the benefit to some particular land of the covenantee, the covenant is personal and collateral to the conveyance as being for the benefit of the covenantee alone.

E) THE TERMINATION OF RESTRICTIVE COVENANTS

There are a number of ways in which a restrictive covenant can be ended. The simplest is that the covenant might have been designated as lasting only for a specified period of time. Another is that the owner of the two tenements may become the same person; in that case the covenant is extinguished and will not be revived by a later splitting of ownership. Note, however, that this does not apply in a building scheme. Third, since a restrictive covenant is an equitable interest in land it is susceptible to the doctrine of laches. Whether or not the delay in enforcing rights has been unreasonable is always a question to be decided on the facts of each case. On this the Ontario Law Reform Commission's 1989 Report on Covenants Affecting Freehold Land states at p. 50: "if the land has been used openly for many years, in a manner inconsistent with the covenant", it will "be presumed to have been released". Fourth, the courts will occasionally consider a covenant to have become obsolete through changes in the character of the neighbourhood brought about by the covenantee(s).

Finally, some Canadian provinces (including Ontario, Alberta, British Columbia and P.E.I.) have legislation permitting an application to the court for modification or removal of a covenant. The permitted reasons for change vary from jurisdiction to jurisdiction, and in some cases include obsolence, thus likely subsuming the equitable rule noted above. In Ontario the Conveyancing and Law of Property Act, R.S.O. 1990, c. C-34, s.61 reads:

> 61 (1) Where there is annexed to land a condition or covenant that the land or a specified part of it is not to be built on or is to be or not to be used in a particular manner, or any other condition or covenant running with or capable of being legally annexed to land, any such condition or covenant may be modified or discharged by order of the Ontario Court (General Division).

The leading case on the interpretation of what is now s.61 is Re Beardmore [1935] 4 D.L.R. 562 (Ont. C.A.). At issue were restrictive covenants in a building scheme which designated the type of buildings which could be erected. An application was made under what is now s. 61 to modify these restrictions and allow for the building of "double duplexes" and "four family dwellings". This was apparently needed because the owners were having great difficulty realising on the lots. The application was opposed by some home owners in the building scheme, but was successful at first instance. The court allowed the appeal. Masten J.A. accepted that the owners were having difficulty selling under the restrictions, but also noted that the opposing parties asserted that they only bought because of those restrictions: they argued that their property would lose value and that they would be deprived of amenities. Masten J.A. said that the guiding principle under the statute was that "the order should not be made unless the benefit to the applicant greatly exceeds any possible detriment to the respondents". Indeed, "the cases decided under the Act are consistent in making plain the extreme caution with which the jurisdiction in question is to be exercised".

A recent discharge case is Parmenter v. British Columbia (1993), 30 R.P.R. (2d) 302 (B.C.S.C.). Parmenter acquired land from the province in 1964 on a lease to purchase agreement. His right to purchase was conditional on his making certain improvements, which he did. When he applied to buy in 1974 he was told for the first time that the land was subject to a covenant restricting the

uses of the land to agricultural purposes. He consented to the covenant because he did not wish to lose the time and money already invested in the land, but was unable to make a success of agricultural ventures. He applied to the government for removal of the covenant, and the government agreed to do so if he paid $1,434,000. This was the difference between the appraised value of the land with the covenant and its value without it. Parmenter applied for removal of the covenant, which the court had power to do if "by reason of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete": Property Law Act, R.S.B.C. 1979, c. 340, s. 31 (2) (a).

The court allowed the application. It held that while the character of the land had not changed, the character of the neighbourhood had changed because of residential and recreational developments in and around nearby Cultus Lake. It mattered not that the nearest development was half a mile away. It also stated that Parmenter had shown by his unsuccessful efforts to farm the land that it was not suitable for this type of use, and that represented "material circumstances" which it took into account.

F) NOTES AND PROBLEMS

1) The Social Context of Covenants. As noted earlier, the content of covenants, the purposes they are used to achieve, can vary greatly. Many seek to preserve the look of neighbourhoods, or to conserve green space. While it is no longer possible to directly restrict who may buy land, increasingly covenants are used to do this indirectly. The study of their use in Kitchener from 1951 to 1991 discussed in Ziff, Principles of Property Law, p. 359, shows a steady rise in the use of covenants which limit or prohibit the building of affordable housing or of residences other than those for single family units. Other covenants have sought to prevent the building of group homes for schizophrenics and the like - see the examples and cases cited in Ziff, p. 360.

An increasingly popular form of covenant is the so-called "conservation covenant". Of course many of the covenants we have looked at seek to conserve natural areas or artificial green space. But if one wanted to preserve a large area, perhaps the whole of one's land, there are difficulties given the common law rules that make a covenant a relation between parcels - there must be a dominant tenement, and the covenant must touch and concern some benefitted land. Somebody who wished to preserve a large tract could get around the covenant rules by selling the land to the government for a park, or to a conservation organization, and attach a condition. But legislation in many provinces now also permits the owner to keep the land while granting a conservation covenant to the government or such an organization, which is registered against title. The landowner still has the land, and undertakes to use it only in certain ways. The covenant holder has the power to enforce the covenant.

Conservation covenants get around the need for a dominant tenement because the legislation makes them an exception to the common law rules. It also allows for the enforcement of positive obligations. Ontario's Conservation Land Act, R.S.O. 1990, c. C.28, as am., permits an owner to enter into a covenant with a "conservation body" for "the conservation, maintenance, restoration or enhancement of all or a portion of the land or wildlife on the land". A "conservation body" can be a government agency, a municipality, an Indian band, a conservation agency, or a non-profit corporation. Other statutes permit conservation covenants for agricultural land, forests, wildlife habitat, etc.

2) Positive Covenants: Should the Burden Run?. As the common law will not run the burden of any covenant, and as equity will only run the burden of negative covenants, the burden of positive covenants will not run. Although this has been criticised in cases, government reports (including the 1989 Ontario Law Reform Commission Report on Covenants Affecting Freehold Land), and academic writing, the rule continues to be adhered to. Not untypical of judicial commentary is that of Nourse L.J. in Rhone v. Stephens, (1993), 67 P. & C.R. 9 (C.A.). He stated that "it is hard to justify its [the rule on positive covenants] retention in the familiar case where ... each successor in title of the covenantor ... has the clearest possible notice of the covenant and effectively agrees to perform it". Nonetheless, the rule in Austerberry v. Oldham had stood for a long time and he was bound by it. The same position was taken by the House of Lords in this

case: [1994] 2 W.L.R. 429.

The reason usually given is that to run the burden of positive covenants would impose too many burdens on too much land, reducing alienability and perhaps coming close to creating a variety of estates unknown to the law. As Lord Brougham said in Keppell v. Bailey (1834), 39 E.R. 1042 (Ch): "great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands a peculiar character, which should follow them into all hands, however remote".

In fact, it is not entirely true to say that the burden of positive covenants will never be enforceable. There are three principal ways in which this can be done.

First, some statutes provide for the enforcement of positive obligations - legislation relating to condominiums, for example, prevents buyers from evading their contribution and repair obligations, and planning legislation also includes provisions for the enforcement of positive obligations.

Second, if the original covenantor also covenants to bind his or her successor-in-title to covenant with the covenantee, and does so, one creates a "chain" of covenants through which the current owner can be made liable. The holder of the dominant land would still sue the original covenantor, but he or she would sue the next in the chain, etc, with the civil procedure joinder rules making it less unwieldy than it might seem at first sight. In addition to the obvious fact that the chain will become increasingly difficult to maintain as more and more transactions take place, it should be noted that only damages will be awarded in such a case because this is not really an "exception" at all, it is contract law. The positive burdens are being enforced by the maintenance of privity of contract, not because they are obligations relating to land.

Third, there is a line of English cases establishing what is called the "principle of benefit and burden". The leading case is Halsall v. Brizell, [1957] Ch 169. Purchasers of plots in a sub-division created deeds of covenant which gave them the right to use the roads, sewers, a promenade and a sea wall provided they and their successors made periodic payments for upkeep. The developer retained these lands. The court held that the successors in title could not take the benefit of the right to use without submitting to liability for contributions. Halsall provides the inspiration for a line of "benefit and burden" cases, those in which the benefit and burden are directly related to each other, and the one conditional on the other so that the burden can at any time be released by giving up the benefit.

There have been a very few judicial attempts, most notably in Tito v. Waddell [1977] Ch 106 to expand this notion into what has been called a "pure principle of benefit and burden". That is, to apply the same reasoning to circumstances in which the obligations of the parties are neither directly related nor conditional one on the other. That is, "to tether previously separate promises". But the courts have generally resisted any such extension, on the grounds, inter alia, that it would fundamentally rewrite the privity of contract rule. Moreover, in Amberwood Investments Ltd v.